# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1949

# No. 51

PETE DARR, PETITIONER,

*vs.*

C. P. BURFORD, WARDEN, OKLAHOMA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX



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—3250

[fol. a] [Caption omitted]

[fol. 1]

**IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT**

No. 3722

PETE DARR, Appellant,

vs.

C. P. BURFORD, Warden, Oklahoma State Penitentiary, Appellee

AMENDED DESIGNATION OF POINTS UPON WHICH APPELLANT SHALL RELY—Filed July 9, 1948

1. Appellant was denied a fair and legal trial according to the Constitution and laws of Oklahoma, and in contravention of the 5th and 14th Amendments of the United States Constitution; and the judgments were therefore void.

2. Appellant was charged with two capital crimes; and had no counsel of his own choosing; was forced to trial without sufficient time to prepare for trial. Appellant made application for continuance for the reason his counsel could not attend the trial and he had two witnesses from another county who would testify for him; that he had no opportunity to call his witnesses on account of his incarceration in the penitentiary. This application was made on January 13, 1931.

3. The court made an order appointing counsel on January 13, 1931, and continued the case to the following day, January 14.

4. Petitioner made application to have two witnesses *subpoenad* from another county. Subpoenas failed to show same were served.

5. Petitioner was not convicted according to Due Process of Law, for being charged with two capital crimes was not *funished* with a list of witnesses to be used in chief against him, at least two days before said causes were set

[fol. 2] for trial, together with their post office addresses, and contrary to the Bill of Rights of the State of Oklahoma.

6. Appellant was tried before a jury on January 14th, 1931; was forced to trial without a witness in his behalf, in case No. 2199, was convicted and sentenced to serve a period of 40 years at hard labor. Court set January 16, for sentence but applicant was sentenced on January 15, 1931.

7. In the second case No. 2197, appellant was held in jail incommunicado while jury was deliberating, and was coerced by the County Attorney into pleading guilty, under fear, and promise of a light sentence. Appellant pleaded guilty and received a sentence of 40 years to run *consecutively* with the former sentence, of 40 years. Appellant attempted to withdraw the plea of guilty which was involuntary, but the Court refused to grant his plea.

8. Appellant contends he exhausted his state remedies before applying to the Federal Court for Writ of Habeas *Courpus*. Appellant was precluded from appealing from the two judgments at the time of trial for he had no funds to make an appeal and was confined in the State Penitentiary at McAlester, Oklahoma, where he was unable to make the appeal.

John J. Carney, Attorney for appellant.

Proof of Service.

I, John J. Carney, attorney for appellant, hereby certify that I have this day, July 8th, made service by mail by placing a copy of Designation of *Pints* as Amended in the United States mail, postage prepaid and addressed to Hon. Mac Q. Willamson, Attorney General of Oklahoma, State Capitol Bldg., Oklahoma City, Oklahoma.

John J. Carney.

Subscribed and sworn to before me this 8th day of July 1948. Jessie Harrold, Notary Public. My Commission expires on the 18th day of April, 1952. (Seal.)

[File endorsement omitted.]

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

Pleas and Proceedings Before The Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, Presiding, In the Following Entitled Cause:

In the Matter of the Application of PETE DARR, for a Writ of Habeas Corpus

No. 2291-Civil

APPLICATION FOR WRIT OF HABEAS CORPUS

To the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma:

1. That your petitioner is now imprisoned and restrained of his liberty by Charles P. Burford, Warden of the State Penitentiary at McAlester, Oklahoma:

2. That the causes of such imprisonment and restraint are two convictions of Robbery with Firearms, under two separate and distinct Informations filed in the District Court of Lincoln County, Oklahoma and numbered 2197-2199.

3. That said imprisonment and restraint are illegal for the reason petitioner did not have a fair and legal trial according to the Constitution and laws of the State of Oklahoma, and that said trial and conviction was in contravention of the 5th and 14th Amendments of the Constitution of the United States of America, as follows, to-wit:

4. Petitioner was transported from the State Penitentiary at McAlester, Oklahoma, on or about November 28, 1930, where he was then serving a prison term under a former conviction, to Chandler, Lincoln County, Oklahoma, by order of the court (See Warrant Page 2 of Record) to plead to two separate and distinct charges of Robbery with Firearms.

Petitioner was placed in jail at Chandler, Oklahoma on said date and remained incommunicado until the morning of December 1st, 1930 when he was taken to the office of the [fol. 4] County Judge of Lincoln County for a preliminary

hearing on said two separate and distinct charges of Robbery with Firearms.

Petitioner was without counsel when he appeared before the County Judge and without funds to employ counsel, when an attorney who introduced himself as Mr. Mathis, offered to assist him without being appointed by the court to defend him: but when petitioner informed said attorney he was without funds and without friends, no assistance was given. See Information, County Court of Lincoln County page 1 of Authenticated Record. See endorsement on Information.

Petitioner waived reading of the Information and Formal arraignment but did not effectively waive his Constitutional rights.

Immediately thereafter and on the same date, two separate and distinct Informations were filed in the District Court of Lincoln County at Chandler, Oklahoma, against your petitioner charging petitioner with Robbery with Firearms: Said cases being No. 2197 and 2199. Petitioner was arraigned before said District Court and pleaded not guilty and on some date petitioner was returned to the State Penitentiary at McAlester, Oklahoma. That both said cases were set for trial January 13th, 1931. That during all the time that elapsed between the date of Petitioner's preliminary hearing, to-wit: December 1st, 1930, until or about January 9th, 1931, petitioner was confined in the said penitentiary at McAlester, Oklahoma and had no opportunity to consult counsel and had no funds to employ counsel, prepare for trial or subpoena witnesses: and with those conditions still existing, petitioner was forced into trial wholly unprepared, and thus petitioner declares he was denied his constitutional rights under the constitution of the United States and the Constitution of the State of Oklahoma.

5. That on or about January 9, 1931, petitioner was returned by order of the court to Chandler, Lincoln County, Oklahoma and placed in jail, where he was again held incommunicado until the morning of January 13th, 1931, on which date the said two cases were set for trial, that on said date petitioner made application to the District [fol. 5] Court for a continuance in order to prepare for trial and subpoena witnesses; that a certified copy of said application for continuance is attached hereto, made part

hereof and Marked "Exhibit A"; that said application appears in the authenticated copy of record at page #4.

6. Petitioner was not convicted according to Due Process of law, for being charged with two separate and distinct capital crimes, your petitioner was not furnished with a list of witnesses to be used in chief against him in the trial of said actions at least two days before said cases were set for trial, together with their postoffice addresses, altho petitioner requested the County Attorney to furnish him with a list of said witnesses to be used in chief against him in the trial of said actions. Article 2—Sec. 20—1941 Statutes of Oklahoma—Bill of Rights. Petitioner further alleges that the post office addresses of witnesses were not endorsed on either of the two informations filed against him.

Bill of Rights—Art. 2—Sec. 21.

"Names of witnesses endorsed on information should contain first name or initials and Must Contain post office addresses."

7. Petitioner alleges that on January 13th, 1931, the court found that petitioner was without counsel and without funds to employ counsel, and appointed M. A. Cox an attorney to represent petitioner, and continued the trial of said causes to the following day, January 14, 1931; that a certified copy of said order is attached hereto, made part hereof and marked "Exhibit B", which copy appears in the authenticated copy of record at page #23. That petitioner made application to have two witnesses subpoena-d from another county who would testify in his behalf; that said subpoenas fail to show the same were served, or attempted to be served in another county and were returned marked "Not found"; that certified copies of said subpoenas are hereto attached, marked "Exhibit C"; that said subpoenas *were* omitted from the authenticated record thru inadvertance.

That on January 14, 1931, petitioner was tried before the Hon. Earl Welch, District Judge, and a jury empaneled on said date: that petitioner was wholly unprepared and forced [fol. 6] to trial without a witness in his behalf; that on said date, the jury returned a verdict of guilty against your petitioner, in case No. 2199, and assessed his punishment at *confinment* in the penitentiary for a period of 40 years, at hard labor, and the Judge set January 16, 1931, for date of sentence; but your petitioner was sentenced on January

15th; see Rec. of judgment page 16, in cause No. 2199. That, thereafter, and on January 14, 1931, your petitioner was brought before the same court on case No. 2197, and a jury empanelled to try said cause; that the State introduced two witnesses and petitioner could introduce none.

Petitioner was held in the jail at Chandler, Oklahoma awaiting the verdict of the jury in Case No. 2197. On the first day, Jan. 14th, the jury had not reached a verdict, and on the following morning the County Attorney visited him in the jail and suggested that your petitioner plead guilty and this, petitioner refused to do. The County Attorney, then informed petitioner if he would plead guilty to the charge he could, obtain for him a sentence of only 10 years, to run concurrently with the former sentence of 40 years imposed upon him. Petitioner still refused to plead guilty to said charge.

Whereupon, the County Attorney then informed petitioner if he did not plead guilty to said charge, he stood to get the electric chair, on account of the bitter feeling against him and then and there informed your petitioner that said charge so filed against him of Robbery with Firearms upon conviction, the death penalty could be assessed against him at the discretion of the Court or the jury.

This startling disclosure of the law under which Petitioner was being tried, horrified your unlearned petitioner and thus deprived him of his judgment and his reason and left him subservient to the suggestions of the County Attorney and while laboring under such feeling of terror that he might receive the death sentence and relying on the promises made to him, that he would receive only a 10 year sentence, if he would enter a plea of guilty on the last Named Charge to run concurrently with the former sentence of 40 years at hard labor, your petitioner was thus coerced into pleading guilty to the last numbered charge 2197, and before the [fol. 7] jury returned a verdict. Petitioner alleges that he could not under such conditions, and did not enter a voluntary plea of guilty; that petitioner was not only coerced into pleading guilty by the statements made to him by the said County Attorney, but was coerced by his fear of receiving the death penalty, and was coerced into pleading guilty by the alleged community hostility against him. Petitioner, under the conditions which existed could not, and did not intelligently waive any of his Constitutional rights, as herein before pleaded.

That thereafter and on the same date, petitioner appeared before the Court and entered his involuntary plea of guilty to said charge; that after being informed by the Court that he would sentence your petitioner to a term of 40 years at hard labor to run consecutively to the 40 years already imposed upon him, your petitioner then attempted to withdraw his plea of guilty; but the Court refused to permit petitioner to withdraw his plea of guilty and immediately sentenced your petitioner to a term of 40 years in the state penitentiary at McAlester, Oklahoma on the last named charge to run consecutively as to the first sentence of 40 years or a total of 80 years at hard labor.

Petitioner declares that such procedure violates the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of the Statute Laws of the State of Oklahoma, and rendered it impossible for petitioner to have a fair and legal trial.

Petitioner states that he exhausted his remedy and means for procuring relief in the State Courts of Oklahoma; and filed a suit in the Criminal Court of Appeals of the State of Oklahoma, to obtain relief from said Judgment and sentence and release from the State penitentiary; that a Judgment was rendered in said Court against your petitioner, and his application for said Writ of Habeas Corpus denied; that said cause was numbered A-10,869 in said Court. Petitioner therefore avers that a Federal question is involved in this action and for that reason, brings this action to the Federal Court for consideration.

Petitioner further alleges that he was precluded from appealing from said two judgments, at the time of trial, [fol. 8] for the reason he had no funds to make such appeal, and for the further reason he was confined in the State penitentiary at McAlester, Oklahoma, where he was unable to earn the means to make the appeal.

Your petitioner, on account of all the facts pleaded in the foregoing petition alleges:

That he was not accorded his statutory and constitutional rights in the trial of either of the two actions by which he was adjudged guilty, as above pleaded; and, therefore avers that the verdict of the jury in cause No. 2199, and the judgment of the court, based upon said Verdict, and likewise the judgment of the court based upon petitioner's involuntary plea of guilty in case No. 2197, were, and are each and all irregular, illegal, unjust and void.

Wherefore, on account of the facts pleaded in the foregoing petition, the petitioner herein prays that this Honorable Court will issue its Writ of Habeas Corpus and direct such Writ to the Warden of the State Penitentiary at McAlester, Oklahoma: and prays that such Writ shall command the said Warden to produce the body of your petitioner before this Court on a day fixed by this Honorable Court and then and there show cause, if any he have why the Writ of Habeas Corpus prayed for shall not be granted and your petitioner discharged.

Pete Darr, Petitioner.

State of Oklahoma, County of Pittsburg, ss.

*Duly sworn to by Pete Darr. Jurat omitted in printing.*

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[fol. 9] EXHIBIT "A"

In the District Court of Lincoln County, Oklahoma, State of Oklahoma, Plaintiff, vs. Pete Darr, Defendant. No. 2199.

Application for Continuance

Comes now the Defendant herein, and prays this Court for a continuance herein for the reason that his counsel has just informed him that he cannot attend the trial; that the Court has appointed other counsel, that he has at least two witnesses, namely Mr. Havens and Mr. Dempsey, of Oklahoma City, Oklahoma that he could *cal* in his defense; that he has had *had* no opportunity to call said witnesses on account of his incarceration in the State Penitentiary.

That applicant is entitled to a continuance in order that he and his counsel *mau* properly present his defense.

*Peat* DARR

Subscribed and sworn to before me this 13th day of Jan. 1931.

Oril Church, Deputy Court Clerk. (Seal.)

Filed Jan. 13, 1931. Don Dunham, Court Clerk, Lincoln County, Oklahoma, by O. C. Deputy.

State of Oklahoma,
Lincoln County, ss:

I, Laura Harris, Court Clerk, within and for the State and County aforesaid do hereby certify that the above and foregoing is a full, true, correct and complete copy of Application for Continuance in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand as Clerk and official seal this 14th day of October, 1947.

Laura Harris, Court Clerk, by Rena Curtis, Deputy.
(Seal.)

[fol. 10] In the District Court of Lincoln County, Oklahoma. State of Oklahoma, Plaintiff, vs. Pete Darr, Defendant. No. 2197.

Application for Continuance

Now comes the Defendant Pete Darr, and prays this Court for a continuance of the trial set for this date, and in support of said application states, that he had employed counsel to defend him and learned only on Jan. 12th, 1931, that said counsel would not attend this trial; that the Court has assigned other counsel to him, and that he has witnesses to summon in his defense, namely Mr. *Eempsey* of Oklahoma City, Oklahoma who will testify that this defendant was at work upon a pipe line on the day defendant is herein charged with this offense.

Applicant further states that one Mr. Havens would testify in his behalf as to his whereabouts on said date; that he has no means to summon said witnesses himself on account of his incarceration in the State Penitentiary.

That applicant is entitled to a continuance in order that he and his counsel may properly present his defense.

*Peat*
H. L. Darr.

Subscribed and sworn to before me this 13th day of Jan. 1931. Oril Church, Deputy Court Clerk, Lincoln County, Okla. (Seal.)

Filed Jan. 13, 1931, Don Dunham, Court Clerk, Lincoln County, Oklahoma, by L. B. Deputy.

STATE OF OKLAHOMA,
Lincoln County, ss:

I, Laura Harris, Court Clerk, within and for the State and County aforesaid do hereby certify that the above and foregoing is a full, true, correct and complete copy of Application for Continuance in the above entitled cause as fully as the same appears of record and on file in my office.

[fol. 11] Witness my hand as Clerk and official seal this 14th day of October, 1947. Laura Harris, Court Clerk, by Rena Curtis, Deputy. (Seal.)

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EXHIBIT "B"

In the District Court of Lincoln County, Oklahoma. State of Oklahoma, Plaintiff, vs. Herman Chevreaux, Pete Darr, Les Cargo and Ted Johnson, Defendants. No. 2199.

Court Order

Now on this 13th day of January, 1931, the trial of Pete Darr, Defendant herein being set for this day and it appearing that said Pete Darr is not represented by counsel and has no funds with which to pay for counsel, it is ordered that M. A. Cox be and he is hereby appointed as special counsel for the Defendant Pete Darr.

EARL WELCH, District Judge

Filed Jan. 15, 1931. Don Dunham, Court Clerk, Lincoln County, Oklahoma. By L. B. Deputy.

STATE OF OKLAHOMA,
Lincoln County, ss:

I, Laura Harris, Court clerk, within and for the State and County aforesaid do hereby certify that the above and foregoing is a full, true, correct and complete copy of Court Order in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand as Clerk and official seal this 14th day of October, 1947.

Laura Harris, Court Clerk. By Gerald Clark, Deputy. (Seal.)

In the District Court of Lincoln County, State of Okla. State of Oklahoma, Plaintiff, vs. Herman Chevreaux, Pete Darr & Les Cargo, Defendants.

Court Order

Now on this 13th day of January, 1931, the trial of Pete Darr, defendant herein having been set for this day and it [fol. 12] appearing that said Defendant has no counsel and no funds with which to procure same, it is ordered that M. A. Cox be and he is hereby appointed as special counsel for said Defendant, Pete Darr.

Earl Welch, District Judge.

Filed Jan. 15, 1931. Don Dunham, Court Clark, Lincoln County, Oklahoma. By L. B. Deputy.

State of Oklahoma,
Lincoln County, ss:

I, Laura Harris, Court Clerk, within and for the State and County aforesaid do hereby certify that the above and foregoing is a full, true, correct and complete copy of Court Order in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand as Clerk and official seal this 14th day of October, 1947.

Laura Harris, Court Clark. By Gerald Clark, Deputy. (Seal.)

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Exhibit C.

Subpoena. District Court.

State of Oklahoma,
Lincoln County, ss:

The State of Oklahoma, to R. L. Dempsey or ——— Dempsey, Contractor in the Oklahoma City Oil Field, ——Haven Travelling Man with Barnsdall Oil Co., Oklahoma City.

We Command You to be and appear in your own person before the Judge of the District Court of the State of Oklahoma, sitting in and for the County of Lincoln, at the Courthouse in Chandler, in the County of Lincoln, on the 14th day of January, 1931, at 9 o'clock A. M., on that day, then and

there to testify on behalf of the Defendant in a certain matter of controversy now pending and undetermined in said Court, wherein the State of Oklahoma is Plaintiff and Pete Darr and —— Defendant and this you will in no wise omit under penalty of law.

[fol. 13] Witness my hand and seal of said court, at Chandler, State of Oklahoma, this 13th day of January, A. D. 1931.

Don Dunham, Court Clerk; L. Burt, Deputy. (Seal.)

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STATE OF OKLAHOMA,
County of Lincoln, ss:

I, the undersigned Judge of the District Court of Lincoln County, Oklahoma, do hereby order that the within witness attend as within commanded.

Earl Welch, Judge. (Seal.)

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STATE OF OKLAHOMA,
Lincoln County, ss:

Received this Subpoena 1-13, 1931, and served the same on the persons within named at the times and in the manner following, to-wit:

The following persons within named not found in said County: R. L. Dempsey, —— Havens.

| | | |
|---|---|---|
| 2 Copies | | $ .50 |
| Mileage 12/00 miles | 120 | 12.00 |
| Not Found 2 | | .10 |
| Total | | $12.60 |

Lewis Wallace, Sheriff. W. E. Gillaspy, Deputy.

Filed Jan. 14, 1931. Don Dunham, Court Clerk, Lincoln County, Oklahoma. By O. C. Deputy.

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STATE OF OKLAHOMA,
Lincoln County, ss:

I, Laura Harris Court Clerk, within and for the State and County aforesaid do hereby certify that the above and foregoing is a full, true, correct and complete copy of Criminal

Subpoena in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand as Clerk and official seal this 14th day of October, 1947.

Laura Harris, Court Clerk. By Rena Curtis, Deputy. (Seal.)

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[fol. 14] Subpoena. District Court.

STATE OF OKLAHOMA,
Lincoln County, ss:

The State of Oklahoma, to R. L. Dempsey, Contractor in the Okla. City Oil *Feild*, —— Haven, Travelling man with Barnsdall Oil Co., Okla. City, Okla.

We Command you to be and appear in your own person before the Judge of the District Court of the State of Oklahoma, sitting in and for the County of Lincoln, at the Courthouse in Chandler, in the County of Lincoln, on the 14th day of January, 1931, at 9 o'clock A. M., on that day, then and there to testify on behalf of the Plaintiff—Defendant—in a certain matter of controversy now pending and undetermined in said Court, wherein the State of Oklahoma is Plaintiff and Pete Darr and —— Defendant and this you will in no wise omit under penalty of law.

Witness my hand and seal of said court at Chandler, State of Oklahoma, this 13th day of January, A. D., 1931.

Don Dunham, Court Clerk. L. Burt, Deputy. (Seal.)

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STATE OF OKLAHOMA,
County of Lincoln, ss:

I, the undersigned Judge of the District Court of Lincoln County, Oklahoma, do hereby order that the *within* witness attend as within commanded.

Earl Welch, Judge. (Seal.)

STATE OF OKLAHOMA,
Lincoln County, ss:

Received this Subpoena 1-13, 1931, and served the same on the persons within named at the times and in the manner following, to wit:

The following persons within named not found in said County: R. L. Dempsey, Haven.

| | |
|---|---|
| 2 Copies | $ .50 |
| Mileage — Miles — | $ |
| Not Found 2 | $ .10 |
| Total | $ .60 |

[fol. 15] Lewis Wallace, Sheriff. By W. E. Gillaspy, Deputy.

Filed Jan. 14, 1931. Don Dunham, Court Clerk, Lincoln County, Oklahoma. By O. C. Deputy.

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STATE OF OKLAHOMA,
Lincoln County, ss:

I, Laura Harris, Court Clerk within and for the State and County aforesaid do hereby certify that the above and foregoing is a full, true, correct and complete copy of Criminal Subpoena in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand as Clerk and official seal this 14th day of October, 1947.

Laura Harris, Court Clerk. By Rena Curtis, Deputy. (Seal.)

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(The above Exhibits A, B and C are attached to the Application of Petitioner which was filed in the United States District Court for the Eastern District of Oklahoma on January 20, 1948, John H. Pugh, Clerk, U. S. District Court. By T. Mc., Deputy Clerk.)

In United States District Court

Response—Filed February 9, 1948

Comes now C. P. Burford, Warden of the Oklahoma State Penitentiary, respondent herein, and states that he holds the petitioner in custody pursuant to two sentences pronounced by the District Court of Lincoln County, Oklahoma, under date of January 15, 1931, whereby said petitioner was committed to said state penitentiary to serve two terms of forty years each.

That petitioner was duly represented by counsel in both cases and his rights fully protected, as shown by the record. That in case No. 2199 petitioner was regularly tried before and convicted by a jury and sentenced by the court in accordance with such verdict. That petitioner gave notice of appeal and was granted an extention of time in which to perfec the same, but made no further effort to take such appeal. [fol. 16] That in case No. 2197, petitioner was duly tried before a jury but before return of a verdict withdrew his plea of not guilty and entered a plea of guilty, voluntarily and with advice of counsel, without inducement or misrepresentation by any representative of the State.

Petitioner abandoned his right of appeal to the Criminal Court of Appeals of the State of Oklahoma, but, in April, 1947, applied to said court for a writ of habeas corpus, which application was, after due hearing and consideration, denied.

C. P. Burford, Warden Oklahoma State Penitentiary, Respondent. Mac Q. Williamson, Attorney General; Sam H. Lattimore, Assistant Attorney General, Attorneys for Respondent.

[File endorsement omitted.]

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In United States District Court

Memorandum and Order—Filed April 22, 1948

Petitioner's application for a writ of habeas corpus; the response of the Warden of the State Penitentiary to whom the writ was directed; and the evidence introduced upon a hearing in open court all disclose that petitioner is now imprisoned and held in the State Penitentiary pursuant to

two judgments and sentences of the District Court of Lincoln County, Oklahoma. He received one sentence after trial and conviction by a jury on a charge of robbery with firearms. The jury by its verdict fixed his penalty at imprisonment for a term of forty years. His other sentence was upon a plea of guilty to a charge of robbery with firearms, and the court *assess* the punishment at imprisonment for a term of forty years. Both sentences were pronounced by the court on the same day. Petitioner's conviction by a jury in one case preceded his plea of guilty in the other case. The judge made no provision for the two sentences to be served concurrently. Under the circumstances and according to Oklahoma law, they must be served consecutively, the sentence on the jury verdict being served first. 21 O. S. A. 61. Ex parte Gilbert, 4 Pac. 2d 695. Approximately seven and one-half years have been served.

[fol. 17] It would serve no useful purpose herein to relate the facts and circumstances leading up to petitioner's trial and conviction by a jury in one case, or to relate the circumstances which he asserts induced him to plead guilty in the other case. Sufficient it is to say that his petition was adequate to invoke the jurisdiction of this Court to issue the writ. 28 U. S. C. A. 453. Whether or not this Court may grant relief is another matter.

At the *threshold* of this case petitioner is confronted with the long and well established rule that a Federal Court will not ordinarily interfere by habeas corpus with the regular course of proceedings under state authority but will leave the applicant for a writ of habeas corpus to exhaust the remedy afforded by the state for determining whether he is illegally restrained of his liberty. Ex parte Royall, 117 U. S. 241; Urquahart v. Brown, 205 U. S. 179; Ex parte Spencer, 228 U. S. 652.

Repeatedly the Federal Courts have said it is only in special cases of peculiar urgency that the due and orderly administration of justice in a state court will be interfered with. In the absence of such circumstances comity and due regard for state jurisdiction demand that relief by the writ of habeas corpus be left to the state courts who are equally charged with the courts of the United States with recognizing and protecting constitutional rights. Not only must a state prisoner resort to the state court, he must exhaust his remedy there before applying to a Federal Court. And

included in the concept of exhausting his remedy in the state court are such remedies as he may have by way of appeal or application for a writ of *cotiorari* to the Supreme Court of the United States. Ex parte Royall, supra; Urquahart v. Brown, supra; Ex parte Spencer, 228 U. S. 652; Ex parte Hawk, 321 U. S. 114; U. S. ex rel. Murphy v. Murphy, 108 Fed. 2d 861, cert. den. 309 U. S. 661, 696; Hall v. People of California, 79 Fed. 2d 132; Goldberg v. McCauley, 91 Fed. 2d 1016; cert. den. 303 U. S. 636; U. S. ex rel Ragolski v. Jackson, 146 Fed. 2d 251, cert. den. 324 U. S. 873; Guy v. Utecht, 144 Fed. 2d 913; Gordon v. Scudder, 163 Fed. 2d 548, cert. den. 68 Sup. Ct. 208; U. S. ex rel Jackson v. [fol. 18] Brady, 133 Fed. 2d 476, cert. den. 63 Sup. Ct. 1029. The rule enunciated above does not apply if the state courts deny at all times all remedies to prisoners imprisoned in violation of the Constitution. Woods v. Nierstheimer, 328, U. S. 211. But petitioner does not contend that the state courts do not afford him a remedy. Indeed, he could not make such a contention in view of the following: Ex parte Snow, 183 Pac. 2d 588; Ex parte Clyde Meadows, 106 Pac. 2d 139, 70 Okla. Cr. 304; In re John R. Cook, 183 Pac. 2d 595; In re Stephens, 160 Pac. 2d 415; Ex parte Barnett, 94 Pac. 2d 18; Ex parte Darr, 183 Pac. 588. Petitioner, however, does make the allegation that he has exhausted his state remedies. In support of this conclusion he relies upon Ex parte Darr, supra, without any showing or contention that he applied to the Supreme Court for certiorari after the adverse decision upon the federal question involved therein.

A State Court may in a habeas corpus proceeding determine the question of whether or not petitioner's incarceration is in violation of the Federal Constitution. Smith v. O'Grady, Warden, 312 U. S. 329. In the early case of Mooney v. Holohan, 294 U. S. 103, the Supreme Court said: "Upon the State Courts equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." A final judgment of a state court denying release under a writ of habeas corpus is reviewable by certiorari in the Supreme Court of the United States if the decision of the State court is based upon a federal question. Betts v. Brady, 316 U. S. 455; Williams v. Kaiser, 323 U. S. 471; Rice v. Olson, 324 U. S. 786; White v. Ragan, 324 U. S. 760; Canizio v. New York, 327 U. S. 82;

Woods v. Nierstheimer, supra. In White v. Ragan, supra, the Supreme Court said: "Where the highest state court in which a decision could be had considers and adjudicates the merits of a petition for habeas corpus, state remedies, including appellate review, are not exhausted so as to permit the filing of a petition for habeas corpus in a federal district court unless the federal question involved is presented to this court on certiorari or appeal from the state court decision".

[fol. 19] The petitioner in his proceeding before the Criminal Court of Appeals presented one of the Constitutional questions now presented. That question is applicable to both judgments and sentences. The Criminal Court of Appeals passed squarely upon his contention. Certainly, he is in no position now to urge that the same question so recently presented to the Criminal Court of Appeals now presents here "a case of peculiar urgency" that requires this court to re-examine the same question, presumably on the same facts, and reach an opposite conclusion, thereby placing this court in the position of "interfering with the orderly administration of justice in the state courts". For this court to do so would be completely to disregard that degree of comity appropriate between the two judicial systems existing under our form of government. The recognized and orderly procedure was for him to petition the Supreme Court for certiorari. Errors, if any, of state courts on Federal constitutional questions are properly corrected in the Supreme Court.

As to the judgment and sentence upon a plea of guilty, it may be conceded that by his pleadings and testimony petitioner presents a serious constitutional question. Von Moltke v. Gillies, Opinion dated January 19, 1948, 332 U. S. 708. But there are two reasons why relief is not here available to him: (1) Conceding, for the sake of argument, that he has a right to test the validity of both judgments and sentences in a habeas corpus proceeding at this time, he had that right in the state court. But he did not urge in the state court the ground now urged against the validity of the judgment and sentence on his plea of guilty. It was his duty to urge, in the state court, every question arising under the Federal Constitution. A state prisoner may not pursue one theory in the state court, and then on the premise that he has exhausted his remedies in the state court, apply

to a federal court for relief on a different theory. Having failed to urge this point in the state court, he may not for the first time raise it in this court. U. S. ex rel Jackson v. Brady, supra. (2) Under the law of Oklahoma petitioner is now imprisoned and held under the judgment and sentence resulting from his conviction by a jury. Until he has in some way been released from custody pursuant to that judgment and imprisoned under the judgment on his [fol. 20] plea of guilty, he may not test the validity of the latter in a habeas corpus proceeding.

Petitioner failed to sustain the burden upon him to sustain the allegations in his petition that he had exhausted his remedies in the state courts. Without expressing any opinion upon the merits of his contentions, relief is Denied, and the Writ Is Discharged.

Dated this the 22nd day of April, 1948.

Eugene Rice, United States District Judge.

[File endorsement omitted.]

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In United States District Court

Notice of Appeal—Filed May 1, 1948

Sirs:

Please take notice, that the above named Appellant, Pete Darr, hereby appeals to the United States Circuit Court of Appeals for the 8th Circuit, at Denver, Colorado, from the order of the United States District Court for the Eastern Division of Oklahoma, entered in the office of the Clerk of the said Court for the Eastern District of Oklahoma on the 22nd day of April, 1948, dismissing the Writ of Habeas *Courpus* issued herein on the 22nd day of April, 1948, and from each and every part of said order as well as from the whole thereof. Dated: 5/1/48.

Pete Darr, Appellant. Address: McAlester, Oklahoma.

Address of Attorney: John J. Carney, 516 Fidelity Bldg., Oklahoma City, Oklahoma.

[fol. 21] IN UNITED STATES DISTRICT COURT

## Transcript of Evidence

Record of proceedings had at McAlester, Oklahoma, on February 8, 1948, before Honorable Eugene Rice, United States District Judge.

Appearances:

For Petitioner: John J. Carney, Esq.
For respondent: Sam Lattimore, Assistant Attorney General.

Mr. Carney: We would like to have the plaintiff or petitioner sworn.

H. L. DARR, produced, sworn and examined as a witness for and in his own behalf testified as follows:

The Clerk: State your name.
The Witness: H. L. Darr.

Direct examination.

By Mr. Carney:

Q. You may state your name to the court.
A. H. L. Darr.
Q. You are the petitioner in this action are you?
A. Yes, sir.
Q. And are confined at this time in the State Penitentiary at McAlester?
A. Yes, sir.
Q. How long have you been so confined?
A. 17 years, 2 months, 15 days.
Q. You were tried before you were sent there, of course?
A. Yes, sir.
Q. On what charges were you charged?
A. Robbery with firearms.
Q. Where were you tried?
A. In Chandler, Lincoln County.
Q. And a judgment rendered against you?
A. Yes, sir. Two 40-year sentences.
Q. The judgment was rendered against you for robbery?
A. Yes, sir.

Q. And the judge in sentencing you pronounced sentence in each of the two separate cases and gave you 40 years in each case?

A. Correct, sir.

[fol. 22] Q. And you are now serving one of those terms?

A. Yes, sir.

Q. The response of the warden of the penitentiary is here and as grounds for not releasing you or not obeying the order of court if one should be made he states this: That you were duly tried before a jury but before return of a verdict you withdrew your plea of not guilty and entered a plea of guilty, voluntarily and with advice of counsel, without inducement or misrepresentation by any representative of the State. You have heard what I have read?

A. Yes, sir.

Q. And understand that you entered a voluntary plea of guilty?

A. No, sir.

Q. I am asking if you heard me read that?

A. Yes, sir.

Q. Did you enter that sort of plea in this case?

A. No, sir.

Q. Will you tell the court now what the proceedings were as far as you can recall in the trial of that case and what happened and what you did and what the County Attorney did and what was done?

A. I will do my best sir. I was taken before the court in Chandler. I was asked where my attorney was.

Q. That was on the day of trial?

A. Yes, sir.

The Court: You are talking about standing trial.

Mr. Carney: That is the one I would like to have considered first.

Q. Go ahead.

A. Well, that was when I was first taken there. The second trial?

Q. It is the second trial we are talking about.

A. Well, they empaneled the jury and all the evidence went to the jury. I plead not guilty. After the jury went out they taken me back to my cell in jail. That evening I was informed that they couldn't reach an agreement on my case, and I was also informed that they were talking

about turning me over to the judge and it would be to my benefit to plead guilty to the judge; by doing so I could get a 10 year sentence running concurrent with the 40 I already had.

Q. You had already been sentenced in one case for 40 years before that?

A. Yes, sir. This I didn't do. There were several words [fol. 23] said regarding to the other case. They returned back to the courthouse I presume. I didn't know anything else about the case until the next morning. I was taken to the court-house. The jury was in the jury box. They still hadn't reached an agreement in my case. I was talked to by the prosecuting attorney and others that I don't recall.

Q. You mean the County Attorney spoke to you?

A. Yes, sir.

Q. What did he say?

A. He advised me to plead guilty in the case, it was going to be turned over to the judge, and I was subject to the death penalty, and if I would plead guilty he would see that I got a 10 year sentence running concurrently with the 40 I had. This was talked over and you don't know how one feels——

Q. Don't tell about that. Tell what happened.

A. After studying over some few minutes and thinking about what they could do to me I plead guilty.

Q. Now, Pete, when the County Attorney told you that the judge or jury could give you the death penalty for what you were charged with if found guilty, what effect did that have upon you?

A. I couldn't hardly explain that. I felt awfully bad, I will say that.

Q. Did it terrify you?

A. Very much so. Yes, sir, indeed.

Q. Now go ahead with your story.

A. So I was taken before the judge and he passed sentence on me on the first case.

Q. Well, pass that up. The second case what was done?

A. Then he asked me if I had anything to say. I said, no, sir, I haven't. So he passed sentence on me on the second case. He also gave me a 40 year sentence. I beg your pardon, I said, it was agreed I should get 10 years

on this second case. He said "I am sentencing you to 40 years in the penitentiary. I am sure that you will appeal this other case and I want to be sure that you have 40 years." I said, I will withdraw my plea then. This he overruled.

Q. Did he refuse to let you withdraw your plea?

A. He said "You are already sentenced, sir." Well, I thanked him.

Q. Then he sentenced you to 40 years I believe on the second trial?

A. Yes, sir.

[fol. 24] Q. Tell what else may have occurred at that time that you now recall.

A. Well, judge your honor, that is all of that case at that particular time. They brought me to the penitentiary then where I have been ever since.

Q. You have been in the penitentiary from that time on until the present time?

A. Yes, sir.

Q. Now tell about the first trial you had.

A. I was taken out of the penitentiary on the 9th day of January, 1931, to Chandler. On the 13th day of January I was taken to the court house. I was asked where my attorney was, sir. I told them I had no attorney and I had no money, but I did have some friends. They said "Well, we will appoint you an attorney."

Q. Who said that?

A. The County Attorney. I said, I would rather have you not do that please. If I am allowed to do so I can get an attorney and I would like very much to have a continuance of this case so I could do that.

Q. You mean until you could procure an attorney?

A. Yes, indeed.

Q. What did the judge say?

A. The judge didn't say anything, your honor. The County Attorney said he couldn't do that they were ready for trial and he would appoint me a lawyer and it wouldn't cost me anything and wouldn't put me to any trouble. I said, you may appoint me one, sir, but it will be entirely against my will. So they appointed me an attorney.

Q. What was the name of the attorney they appointed to represent you?

A. His name was Cox.

Q. That was on the day your case was set for trial, the 13th day of January?

A. Yes, sir.

Q. What was done if anything about the case, about the hearing, on that date?

A. Will you repeat that?

Q. What if anything was done about the case at that time?

A. They heard it then. They didn't continue it.

Q. Did you know Mr. Cox who was appointed as your attorney at that time?

A. No, sir.

Q. Now, when the case was tried did you have any attorney there except this man whom the court appointed, Cox, there was no other attorney?

A. Well, there was an attorney by the name of — — that came over there, but he didn't do anything about the case, but he did talk to Mr. Cox.

[fol. 25] Q. Well, I mean there was no attorney in court for you except Mr. Cox?

A. No, sir. He was my attorney.

Q. Tell what proceedings were in the court after his appointment.

A. Well, he talked to the judge.

Q. No, I mean about trying the case. Was any evidence introduced in the case on behalf of the state?

A. Well, sir, there was three bankers in the bank. I believe that was the First State Bank of Prague. They was put on the stand one after the other, and they said that I wasn't the man, or they wouldn't identify me as being the man that robbed the bank. Nevertheless——

Q. The question was asked them, I suppose, in your presence in the court room if you were the man who robbed the bank?

A. Oh, yes, indeed.

Q. Those persons were the cashier, assistant cashier and bookkeeper?

A. I presume so.

Q. And said they were present when the bank was robbed?

A. Yes, sir.

Q. Did they or either one of them identify you?

A. No, sir.

Q. As the person who took part in the robbery of this bank?

A. No, sir, they didn't.

Q. You didn't have any witness there I suppose?

A. Not a one at either trial.

Q. And there was no witness introduced in your behalf?

A. No, sir.

Q. What did you say if anything about postponing the trial of the case until you could get a witness or witnesses?

A. Well, I asked to do that. I think you can find on file that I asked to get my witnesses and continue the case.

Q. There was no continuance granted?

A. No, sir, not any at all.

Q. When this case was called for trial those three people from the bank were present in the court room?

A. Yes, sir.

Q. And were sworn and gave testimony?

A. Yes, sir.

Q. And each said they could not and did not recognize you?

A. Yes, sir.

Q. As one of the parties who took part in that robbery?

A. Yes, sir.

[fol. 26] Q. Is that true?

A. Yes, sir.

Q. Did you have witnesses there?

A. No, sir.

Q. And you didn't have any attorney except the attorney whom the court appointed?

A. Mr. Cox.

Q. Isn't it true that there was no witness sworn and none testified in your behalf?

A. No, sir.

Q. And at the conclusion of the trial, or rather at the conclusion of the admission of evidence, this man Cox demurred to the evidence. Is that correct?

A. Yes, sir.

Q. And the demurrer was overruled. Is that correct?

A. Yes, sir.

Q. And when you were asked if you had a witness or witnesses in court available for testifying you told them no?

A. Yes, sir.

Q. And the case went to the jury for their consideration without any evidence being introduced in your behalf at all?

A. That is right. Yes, sir.

Q. There was a witness in court who testified that he was somewhere in the vicinity of that bank?

A. Yes, sir.

Q. At the time it was robbed?

A. Yes, sir.

Q. And he looked in the direction of the bank when about three doors away and across the street and said he saw somebody go in the bank and he believed it was you?

A. Yes, sir.

Q. Is that all the testimony that was introduced against you?

A. Yes, sir.

Q. And the people in the bank didn't swear against you at all, did they?

A. No, sir.

Q. After the testimony was all closed and the case ended the jury went out?

A. Yes, sir.

Q. And returned a verdict against you finding you guilty of robbing the bank?

A. No, they didn't reach an agreement, sir.

The Court: Listen to his questions. He is talking about the first trial.

Q. Yes, the first trial. It found you guilty the same day the case was tried did they not?

A. Yes, sir.

Q. And in addition to finding you guilty of robbery with firearms they imposed a penalty of 40 years in the penitentiary?

A. Yes, sir.

[fol. 27] Q. As they had the right to do under our laws. You understood that, didn't you?

A. Yes, sir.

Q. And that is the sentence you are serving now along with the other one wherein you plead guilty?

A. Yes, sir.

Q. Now, Pete, you didn't have any other witness or representation or any other action taken in your behalf in court except what you have testified to here, did you?

A. No, sir.

Q. Did any attorney other than the attorney referred to represent you in that case?

A. No, sir.

Q. That is the only representation you had?

A. Yes, sir.

Q. Just as you have told the court?

A. Yes, sir.

Q. And both the sentences were carried into execution at the same time you were taken to prison from Chandler. On what date do you remember?

A. On the 16th day of January I was brought back to prison.

Q. Do you or do you not remember this, that when the court found you guilty he fixed the day to impose sentence upon you for the 15th day of January?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Not the 15th but the 16th, and sentenced you on the 15th?

A. Well, I was sentenced on the 15th.

Q. Well, I say, didn't the court fix the day for sentencing for the 16th of January. That is what the record shows.

A. Well, I don't remember.

Q. You didn't have any other or further representation in the trial of this case or before the trial than you have already described here?

A. No, sir.

Q. In the response to your petition which was filed in this court today the allegation is made that you were fully and ably represented in the trial of your case in Chandler. This man Cox who represented you, or who was appointed to represent you, didn't see you or talk with you until the day your case was tried, did he?

A. No, sir.

Q. Did he consult you about your case then and ask questions about the case?

A. No, sir.

Q. Pertaining to the facts surrounding the charge against you?

A. No, sir.

Q. Did he ever talk with you until the case was called for trial I mean about the case?

A. No, sir.

[fol. 28] Q. Did he ever advise you as to what the case was or trial was or what the effect of the trial was or would be?

A. No, sir.

Q. In other words, did he ever give you advice in the case at all?

A. No, sir, he didn't.

Q. And nobody else did, did they?

A. No, sir.

Q. This response states that you were given advice by your counsel and entered a voluntary plea of guilty.

A. No, sir.

Q. Wait a minute. That there was a voluntary plea of guilty to this case wherein you did plead guilty. Now, Pete, do you know what the word "voluntary" means?

A. Yes, sir.

Q. Tell the court what you think it means.

A. With your own free will.

Q. That is right. That is doing very well. That you entered a plea of guilty to that case of your own free will. Did you do that?

A. No, sir, I didn't.

Q. What is your view of the cause that caused you to plead guilty to that one case?

The Court: He has told us that. If he has anything additional all right.

Q. When the County Attorney saw you in the jail after your case had been called what did he tell you?

The Court: Now, just a minute. He never did say the County Attorney saw him in jail.

Q. Did the County Attorney see you in jail?

A. Yes, sir.

Q. And on what date did he see you?

A. On the 14th.

Q. 14th of January?

A. 1931.

Q. Did you send for the County Attorney?

A. No, sir.

Q. Did you request his presence in the jail to see you?

A. No, sir.

Q. His appearance there was without your request or solicitation, was it?

A. Yes, sir.

Q. When he went to the jail now what did he tell you?

A. Well, he said they couldn't reach a verdict in my case.

Q. I am talking about when you were tried the first time.

A. Oh, yes, sir. He didn't say anything about either one [fol. 29] of the cases. He merely came over there. He didn't say anything about the cases at that time. The second trial is the only time he came over there and asked me anything about my case at all.

Q. That is on the second visit?

A. On my second trial.

Q. And did he tell you then you were liable to get the death penalty unless you plead guilty?

A. He did indeed.

Q. Did you believe what he said to you?

A. Well, I did. They could give me the death penalty.

Q. Did you believe what the County Attorney told you? You didn't know until somebody told you you could get the death penalty?

A. I hadn't thought about it that much, but I did at that time. I went to studying.

Q. And the next day you plead guilty?

A. Yes, sir.

Mr. Carney: I think for the present I will ask the United States Attorney if he has any questions to ask.

The Court: The United States Attorney shakes his head. He is here on the question of jurisdiction pure and simple. He is not here to oppose this matter. The question of jurisdiction of this court is the government's only interest.

Mr. Summers: That is correct.

The Court: He has no objection to this man being released.

Mr. Summers: Taking no part in that. I have filed a memorandum and given counsel a copy.

Mr. Carney: That is a Richard I didn't expect to be in the battle.

The Court: He is down here as a friend of the court pure and simple. Have you finished your examination?

Mr. Carney: I have for the present, your honor. I may want to ask some further questions later, but for the present I am through.

The Court: We will give you all the opportunity you want. Does the State want to ask any questions on cross examination?

[fol. 30] Cross-examination.

By Mr. Lattimore:

Q. Mr. Darr, at your preliminary hearing before the County Judge over at Chandler, and then at your arraignment in the District Court on the first of December, 1930, you were represented by Jimmie Mathis, were you not?

A. He waived—

The Court: Just answer the question.

A. Yes, sir.

Q. Jimmie Mathis had previously represented you about a month before in your trial at Ardmore hadn't he?

A. Yes, sir.

Q. At which time you were convicted of bank robbery and given a sentence of 20 years in the penitentiary?

A. Yes, sir.

Q. And at the time you were brought over to Chandler for arraignment on these two charges and at the time you were brought over there for trial you were then serving this 20 year sentence from Ardmore?

A. Yes, sir.

Mr. Carney: We object to that question, your honor.

The Court: Overruled.

Q. You were at that time serving this 20 year sentence from Ardmore?

A. Yes, sir.

Q. And it was not until June, 1940, that you were billed in to the penitentiary at McAlester under the conviction at Chandler?

A. Yes, sir.

Q. So that you have now served 7½ years on the first of these two sentences given you up at Chandler?

A. Yes, sir.

Q. Before you were tried and convicted at Ardmore you had previously served a term in the Texas Penitentiary at Huntsville?

A. Yes, sir.

Q. A six year sentence for burglary?

A. Well, it was for helping.

Q. You had been in the penitentiary since 1925?

A. That is right, sir.

Q. And out here at the penitentiary you are also held under a hold order for a murder charge?

A. Yes, sir.

Mr. Carney: We object to that question, your honor.

[fol. 31] The Court: Overruled.

Mr. Carney: Exception.

Q. When you were brought back from McAlester to Chandler for trial in January, 1931, and the case was called for trial on the 13th you then advised the court Mr. Mathis had withdrawn from the case?

A. No, sir.

Q. Didn't you tell the court at that time Mr. Mathis had advised you he was not going to appear?

A. No, sir.

Q. And then the court appointed Mr. Cox to represent you in both of these cases?

A. Yes, sir.

Q. And passed the case from the 13th of January over until the 14th?

A. No, sir.

Q. You know the record shows that to be a fact, do you not?

A. Well, I don't remember it that way. I did say the 13th. I may be wrong, but that would be what I would say.

Q. It was on the 13th Mr. Cox was appointed and he made a motion for a continuance on the ground that you had two witnesses in Oklahoma City?

A. I gave notice yes, sir.

Q. And the court passed the case over until the next day?

A. No, sir.

Q. And then on the 14th the jury was selected and you were tried and convicted and given 40 years by the jury?

A. Yes, sir.

Q. This second case went to trial and the State's witnesses had testified and then the case went over until the next day?

A. Yes, sir.

Q. And on the next morning when the case was called for trial you then asked leave to withdraw your plea of not guilty and entered a plea of guilty?

A. Yes, sir.

Q. And that was done and you were sentenced by the court to this additional 40 years?

A. Yes, sir.

Q. You knew that the punishment for this crime of robbery with firearms was from 5 years in the penitentiary up to death in the electric chair, didn't you?

A. No, sir, I didn't.

Q. You had heard the instructions of the court to the jury in the first trial?

A. Yes, sir.

Q. And the court had instructed the jury, that jury which gave you 40 years, the court instructed the jury as to the [fol. 32] sentence provided for robbery with firearms?

A. Yes, sir.

Q. And from those instructions, as well as the advice of your attorney, you knew that the punishment for robbery with firearms was from 5 years in the penitentiary up to life in the penitentiary or death?

A. I didn't get any advice from my attorney at all.

Q. And after you were convicted and sentenced you gave notice of appeal to the Criminal Court of Appeals, did you not?

A. Yes, sir.

Q. And then was given time for the preparation of a case-made and lodging of that appeal in the Criminal Court of Appeals?

A. No, sir.

Q. There wasn't?

A. No, sir.

Q. No notice of appeal was given?

A. No, sir.

Q. You did not prosecute an appeal, you did not take an appeal?

A. No, sir.

Q. But you did in April last year apply to the Criminal Court of Appeals for a writ of habeas corpus?

A. Yes, sir.

Q. And you were heard before that court, the record introduced of the proceedings in the court at Chandler, and the court rendered an opinion denying that petition?

A. Yes, sir.

Mr. Lattimore: I believe that is all.

Redirect examination.

By Mr. Carney:

Q. When you answered awhile ago that no notice of appeal was given in court you don't know what that means, do you, and no proceedings were had there. Those are things you wouldn't know. You don't know now?

A. Well, I didn't give notice myself.

Q. Would you have entered a plea of guilty to this case in the court, the second case that was tried, if you had not been told by the County Attorney you would probably get the death penalty if you didn't plead guilty?

A. I wouldn't, sir.

Q. And the reason you plead guilty was because you were afraid if you didn't plead guilty you would be sentenced to death?

A. Yes, sir.

[fol. 33] Q. For this charge, on this charge?

A. Yes, sir.

Q. Do you recall what was said in the court room where you were tried in Chandler about the robbery that took place in the bank in Prague? In other words, were those three witnesses from the bank asked by the County Attorney if they recognized you as the man who participated in that robbery?

A. Yes, sir, they was asked that question.

Q. And what did they answer?

A. They said they didn't know whether I was the man or not, they wouldn't say I was the man, but nevertheless——

Q. On the statement or evidence given by somebody else they convicted you on that occasion?

A. Yes, sir, the witness——

Q. Never mind, just answer the question.

A. Yes, sir.

Q. What did that man swear against you, what was his statement? In the first place where was he?

A. He said the opposite side of the street four doors up and looked in the bank and I was the man that was robbing it.

Q. Is that the only evidence they had against you?

A. Yes, sir.

Q. And the three witnesses in the bank said they couldn't tell whether you were the man or not?

A. They didn't identify me, yes, sir.

Recross examination.

By Mr. Lattimore:

Q. In this petition which you filed in the Criminal Court of Appeals in April of last year you state, do you not: "Plaintiff avers that prior to the date set for hearing said cause he had made arrangements for counsel to represent him but on the day prior to the date set for hearing plaintiff was informed by his proposed counsel that he the said attorney would not represent your petitioner in the trial of said action." That is your allegation in that petition last year?

A. I don't remember, sir.

Q. In your application for a continuance filed in the District Court at Chandler on the 13th of January, 1931, the date the case was called for trial, you stated over your signature, did you not:

"Comes now the defendant herein, and prays this court [fol. 34] for a continuance herein for the reason that his counsel has just informed him that he cannot attend the trial; that the court has appointed other counsel, that he has at least two witnesses, namely Mr. Havens and Mr. Dempsey, of Oklahoma City, Oklahoma, that he would call in his defense; that he has had no opportunity to call said witnesses on account of his incarceration in the State penitentiary."

That was your application for continuance?

A. Yes, sir.

Redirect examination.

By Mr. Carney:

Q. When you were returned to Chandler from the penitentiary did you have any communication with anybody on the outside concerning your case?

A. No, sir.

Q. Did you try to have any communication?

A. No, sir.

Q. Did you have any funds at that time with which to employ counsel?

A. No, sir.

Q. Had you been able to procure funds before the date set for trial for the employment of counsel?

A. No, sir.

Q. And if I understand you then you didn't have an attorney and didn't have the means to hire an attorney?

A. No, sir.

Mr. Carney: I believe that is all for the present.

The Court: What was the name of the County Attorney?

A. John Embry.

The Court: What was the name of the District Judge you appeared before?

A. Earl Welch.

The Court: Is Mr. Cox appointed to represent you still living?

A. I don't know, sir. I think he is.

Mr. Carney: I believe I can answer that question, your honor. I was in Chandler recently and made inquiry and I was informed he is still living there.

The Court: Are these three bankers that testified in the case still living?

A. I don't know.

The Court: I will ask you, Mr. Carney.

Mr. Carney: There is at least one living, your honor.

The Court: The man who testified that he was across [fol. 35] the street and saw you in the bank, is he living or dead?

A. I don't know.

Mr. Carney: I don't know that, your honor.

The Court: Did Mr. Mathis represent you at the time you had a preliminary trial? I take it you had a preliminary trial.

A. No, sir, he waived.

The Court: He appeared for you at that time?

A. Yes, sir.

The Court: Had he told you what you were charged with, Mr. Mathis?

A. Yes, sir.

The Court: Did he tell you what the penalty would be?

A. No, sir.

The Court: Had you been tried on the same kind of charge down at Ardmore?

A. Yes, sir.

The Court: Did he tell you what the penalty would be down there?

A. Yes, sir.

The Court: You knew that it was the same kind of charge?

A. Yes, sir.

The Court: Then you knew it was possible to get the death penalty?

A. Yes, sir.

The Court: I mean that could be a legal sentence?

A. Yes, sir.

The Court: When you were talking about some people coming you said "They came to the jail."

A. Well, that would be the Prosecuting Attorney and Claud Beaver and a deputy by the name of Zachery.

The Court: Three of them came over?

A. Yes, sir.

The Court: Did they ever finish the trial in the first case? I mean conclude the evidence and the court instruct the jury before you withdrew your plea?

A. Yes, sir.

The Court: The jury had been out?

A. Twice.

The Court: They had been out considering your case?

A. The second time.

[fol. 36] The Court: And hadn't been able to agree?

A. Yes, sir.

The Court: Are you sure when you were sentenced, the 15th or 16th?

A. 16th.

The Court: Were you sentenced immediately after you withdrew your plea and entered a plea of guilty?

A. Yes, sir.

The Court: Was Mr. Cox, the attorney appointed by the court, with you at that time in the court room?

A. Yes, sir.

The Court: Did he represent you in the second trial?

A. Yes, sir.

Examination.

By Mr. Carney:

Q. This counsel who was appointed didn't make any defense for you in the second trial, did he? I mean he didn't argue the case.

A. He argued the case. He didn't present any evidence.

Q. May I refresh your memory by saying this to you. Do you remember whether he demurred to the evidence that had been introduced in the trial?

A. What do-s "demur" mean?

Q. That means he said the evidence wasn't sufficient to convict you and asked the jury to turn you loose, something to that effect?

A. No, sir.

Q. Pete, when you were heard before the court in either of those cases, the first or the second trial, did anybody appear for you except the appointed counsel?

A. No, sir.

Q. Mr. Cox?

A. Yes, sir.

Q. And you did not know him, did you?

A. No, sir.

Q. Did you know him before the day the case was tried?

A. No, sir.

Q. And when he appeared in court for you did he make any interrogation or propound any questions to you?

A. No, sir.

Q. And did he ask you about the case, the facts?

A. No, sir.

Q. And when you went into the trial he made no investigation before the trial?

A. No, sir.

[fol. 37] Q. By asking you questions about the case, had he?

A. No, sir.

Q. And as far as you know he didn't know anything at all about the case?

A. No, sir.

Q. Until the case was called for trial?

A. No, sir.

Q. And you were sworn as a witness?

A. No, sir.

Q. Had you ever heard of him or talked with him about any other case or matter in court?

A. No, sir.

Q. Did you know him before that date?

A. No, sir.

Mr. Carney: I believe that is all.

(Witness excused.)

The Court: Do you want to introduce any record you have?

Mr. Carney: Yes, your honor. I think I will. I will do that right now. I want these marked as exhibits. (Petitioner's Exhibits #1 and #2.)

I would like to ask the petitioner a few more questions.

The Court: All right. Come back to the stand.

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H. L. Darr having been recalled testified as follows:

Direct examination.

By Mr. Carney:

Q. Did the County Attorney of Lincoln County, or anybody for him or for the state, serve you with a list of witnesses expected to be used against you in the trial of the case at any time and especially a few days before the case was set for trial?

A. No, sir.

Q. Did you know who the witnesses were to be used against you, know their names or any information about them before the case was set for trial?

A. No, sir.

Q. Were the names of the witnesses ever endorsed in the information against you in either of the cases along with the post office address served upon you before the case was tried?

A. No, sir.

Q. You didn't know then from anything you had learned from any source who the witnesses were that were to be used against you in the trial of the case or their post office addresses?

A. No, sir.

[fol. 38] Mr. Carney: I have this record, if your honor please, I would like to have it received in evidence.

The Court: It will be admitted.

Mr. Carney: That is all.

The Court: Do you have any other evidence?

Mr. Carney: I don't think of any at this time.

The Court: Do you have any evidence?

Mr. Lattimore: No, sir.

The Court: I assume he introduced all the records.

Mr. Lattimore: He introduced all the records.

(Plaintiff allowed 20 days from this date to file brief and 15 days thereafter for the state to file reply brief.)

(Hearing closed.)

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PETITIONER'S EXHIBIT 1

In the District Court of Lincoln County, Oklahoma, State of Oklahoma, Plaintiff, vs. Pete Darr, Defendant. No. 2199.

Judgment and Sentence

Now on this 14th day of January, 1931, the same being one of the regular judicial days of the December, 1930, Term of the District Court of Lincoln County, Oklahoma, this matter comes on for trial upon the regular assignment of causes before the Hon. Earl Welch, Assigned Judge of the District Court in and for Lincoln County, Oklahoma, and the State of Oklahoma being represented by John Embry, County Attorney and Joseph A. Young, Assistant County Attorney, and the defendant being present in person and by his attorneys, M. A. Cox and W. C. Tichenour.

Whereupon both the State and the defendant announce ready for trial; whereupon a jury is drawn, empaneled and sworn to try said cause, and the cause proceeds to trial before the court and jury. Whereupon the State introduces its evidence and rests; whereupon the defendant demurs to [fol. 39] the evidence and moves for a directed verdict which motion is by the Court overruled and exception allowed. Whereupon the defendant rests. Whereupon the Court instructs the jury and after the argument of counsel, said cause is submitted to the jury, and the jury retires on the 14th day of January, 1931, to deliberate.

And thereafter, on the 14th day of January, 1931, the said jury composed of George Tillery, Ray Rounsavil, Brady Satterfield, E. W. Overman, O. J. Meyer, E. J. Martin, C. B. Cline, George Scott, Jr., C. S. Curry, G. E. (George) Sipe, Fred S. Lynch and R. L. Berry, twelve good men and true, returned into court with its verdict, in form and words as follows, to-wit:

State of Oklahoma, County of Lincoln, ss.

In the District Court of the Tenth Judicial District. Sitting within and for said County and State. State of Oklahoma, Plaintiff, vs. Pete Darr, Defendant. No. 2199.

Verdict

We, the Jury, duly empaneled and sworn to try the above cause, do upon our oaths, find the Defendant Pete Darr guilty as charged in the information of the crime of robbery with firearms and fix his punishment at imprisonment in the State Penitentiary for (40) forty years.

G. E. Sipe, Foreman.

and the verdict is by the Court received and read in open Court, the said defendant, Pete Darr, being present in person and by his attorneys, M. A. Cox and W. C. Tichenour, and the jury is polled and each juror for himself answers that said verdict is his verdict and said verdict is by the Court ordered filed and spread upon the records of the Court.

And now on this 15th day of January, 1931, this matter comes on for judgment and sentence, and the defendant, Pete Darr being present in person and by his attorney, M. A. Cox, and the State of Oklahoma being represented by John Embry, County Attorney, and Joseph A. Young, Assistant County Attorney, and no legal cause shown why said [fol. 40] defendant should not be sentenced, It Is Therefore Ordered, Sentenced and Adjudged, By the Court, that the verdict of the Jury is the Judgment and Sentence of the Court, and that the said defendant, Pete Darr, is guilty of the crime of Robbery with Firearms as charged in the information herein, which is shown by the verdict of the jury, aforesaid, and that he, the said Pete Darr, be imprisoned in the State Penitentiary at McAlester, Oklahoma, for a period of forty years (40), at hard labor, and to pay the

costs of this prosecution, said costs being in the sum of $215.77. And that upon the failure of said defendant to pay said costs that he be confined in said penitentiary one day for each dollar of said costs remaining unpaid.

It Is Further Ordered, and Decreed, By the Court, that the Sheriff of Lincoln County, Oklahoma, deliver the said Pete Darr, to the Warden of the State Penitentiary, or his agent designated by said Warden, to transport the said Pete Darr to the penitentiary, at McAlester, Oklahoma, and that the Warden of said Penitentiary do detain the said Pete Darr, according to this judgment and sentence, and that the Court Clerk of Lincoln County, Oklahoma, do immediately certify, under seal of this Court, and deliver to the Sheriff of Lincoln County, Oklahoma, to be delivered to the warden of the State Penitentiary, two copies of this judgment and sentence, one of said copies to accompany the body of the said Pete Darr to the said State Penitentiary, and to be left therewith, said copy to be the warrant and authority of said Warden for the transportation and imprisonment of the said Pete Darr, as herein provided; said last copy to be returned to the Court Clerk of Lincoln County, Oklahoma, with the return of the said Warden indorsed thereon.

Done in open Court this 15th day of January, 1931.

EARL WELCH,
Assigned District Judge.

State of Oklahoma, Lincoln County, ss.

I, Don Dunham, Court Clerk, within and for the State and County aforesaid, do hereby certify that the above and foregoing is a full, true, correct and complete copy of Judg-
[fol. 41] ment & Sentence in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand as Clerk and official seal this 15th day of January, 1931.

Don Dunham, Court Clerk. By L. B. Deputy. (Seal.)

Filed Jan. 17, 1931. Don Dunham, Court Clerk, Lincoln County, Oklahoma, By O. C. Deputy.

State of Oklahoma, County of Lincoln, ss.

Received this writ on this 15th day of January, 1931, and on the 16th day of January 1931, as commanded therein, I delivered to the State Penitentiary located at McAlester,

Oklahoma, the within named defendant, Pete Darr, receipt attached.

Sheriff fees, Mileage $13.30, Miles 133, Total 13.30.

Lewis Wallace, Sheriff, By W. E. Gillaspy, Under-Sheriff.

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[Defendant's application for continuance in case No. 2199 appears as part of Exhibit A to the petition, printed page 9.]

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[The order appointing counsel in case No. 2199 appears as part of Exhibit B to the petition, printed page 11.]

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PETITIONER'S EXHIBIT 2

[Defendant's application for continuance in case No. 2197 appears as part of Exhibit A to the petition, printed page 10.]

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[The order appointing counsel in case No. 2197 appears as part of Exhibit B to the petition, printed page 11.]

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[fol. 42] JUDGMENT AND SENTENCE ON PLEA OF GUILTY (Felony)

State of Oklahoma, Lincoln County, ss. In the District Court in and for said County and State. State of Oklahoma, Plaintiff, vs. Pete Darr, Defendant. No. 2197.

Now on this 15th day of January, 1931 the defendant Pete Darr, being present in open Court in his own proper person and having been legally charged and arraigned and having plead guilty to the offense of robbery with firearms committed in Lincoln County, Oklahoma, the defendant now appearing at the time appointed by the Court for pronouncing judgment, and being informed by the Court of the nature of the charge against him and his plea thereto, and upon being asked by the Court whether he had any legal cause to show why judgment and sentence should not be pronounced against him and none appearing to the Court, the

Court does hereby adjudge the said defendant guilty of the offense charged in the information.

It Is Therefore Considered, Ordered, Adjudged and Decreed by the Court that you the said Pete Darr are guilty of the crime of Robbery with Firearms and that you be committed to be imprisoned in the State Penitentiary at McAlester in the State of Oklahoma and be confined in the said State Penitentiary for the term of Forty Years at hard labor for said offense of Robbery with firearms said term of sentence to begin at and from and after incarceration and that said defendant pay the costs of this prosecution, taxed at $169.75 for which judgment is hereby rendered against said defendant; and it is further ordered and adjudged that upon the failure of the defendant to pay said costs that he be confined in the State *Penitentary* one day for each dollar of the costs unpaid.

It Is Further Ordered, Adjudged and Decreed by the Court that the Sheriff of Lincoln County, Oklahoma, deliver the said Pete Darr to the warden of the State Penitentiary, or to an agent designated by said warden to transport the said Pete Darr to the *Penitentary* at McAlester in the State of Oklahoma, and that the warden of the State *Penitentary* do detain the said Pete Darr according to this judgment and sentence, and that the Court Clerk of this county do immediately certify, under the seal of this Court and de-
[fol. 43] liver*er* to the Sheriff of Lincoln County, Oklahoma, to be delivered to the warden of the State *Penitentary* two copies of this judgment and sentence, one of said copies to accompany the body of the said Pete Darr to the said *Penitentary* at McAlester in the State of Oklahoma and to be left therewith *at* the said Warden, said copy to be the warrant and authority of said warden for the transportation and imprisonment of the said *Warden* as hereinbefore provided. Said last named copy to be returned to the Court Clerk of the County of Lincoln, Oklahoma, with the return of said warden endorsed thereon.

Done in open court on this 15th day of January, 1931.

Earl Welch, Assigned Judge District Court.

State of Oklahoma, Lincoln County, ss.

I, Don Dunham, Court Clerk in and for said County and State aforesaid, do hereby certify that the above and fore-

going is a true, correct and complete copy of the judgment and sentence in the case of the State of Oklahoma vs. Pete Darr as the same appears of record and on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court on this —— day of January, 1931.

Don Dunham, Court Clerk.

Rec. Jr. 39. Page 270. No. 2197 Filed Jan. 15, 1931. Judgment and Sentence. Don Dunham, Court Clerk, Lincoln County, Oklahoma, by D. D.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

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IN UNITED STATES DISTRICT COURT

CERTIFICATE OF PROBABLE CAUSE—Filed June 3, 1948

Pursuant to 28 U. S. C. A., Section 466, as the trial judge who rendered the decision in the above cause, discharging the writ, I do hereby certify that the petitioner has probable cause for appeal in this case, and in my judgment the appeal should be allowed.

Dated this the 3rd day of June, 1948.

Eugene Rice, United States District Judge.

[File endorsement omitted.]

Clerk's Certificate to foregoing paper omitted in printing.

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[fol. 45] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RECORD ENTRY: CAUSE ARGUED AND SUBMITTED

Third Day, November Term, Wednesday, December 1st, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard, John J. Carney, Esquire, appearing for appellant, no one appearing for appellee.

On motion, appellant was granted leave to file four typewritten copies of a supplemental brief herein within ten days from this date.

Thereupon this cause was argued by counsel for appellant and submitted to the court.

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IN UNITED STATES COURT OF APPEALS

John J. Carney for Appellant. Before Phillips, Chief Judge, and Bratton and Huxman, Circuit Judges.

OPINION—January 31, 1949

Bratton, Circuit Judge:

This is a proceeding in habeas corpus instituted in the United States Court for Eastern Oklahoma by Pete Darr, hereinafter referred to as petitioner, against C. P. Burford, warden of the state penitentiary at McAlester, Oklahoma. The petition for the writ alleged in substance that two informations were filed in the District Court of Lincoln County, Oklahoma, each charging petitioner with the robbery of a bank; that at the time of the filing of the informations, petitioner was serving a term in the state penitentiary; that he did not have funds with which to employ counsel; that a day or two prior to the time the cases were set for trial, the court appointed an attorney to represent petitioner; that petitioner had no opportunity to consult with counsel; that [fol. 46] an application was made in each case for a continuance in order to prepare for trial; that the applications were denied; that petitioner made application in each case to have two witnesses subpoenaed from another county; that the subpoenas failed to show that they were served or that any effort was made to serve them in such county; that petitioner was forced into trial of the cases unprepared; that he was found guilty in the first case; that while the jury was deliberating upon its verdict in the second case, he was induced through fear and by coercive methods of the prosecuting attorney to withdraw his plea of not guilty and enter a plea of guilty in that case; and that he was sentenced in each case to imprisonment for a period of forty years, the two sentences to run consecutively. The petition further alleges that the sentences were in violation of the rights of petitioner under the Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of the laws of Oklahoma; that lack of funds precluded him from perfecting appeals from the judgments and sentences;

that he sought a writ of habeas corpus in the Criminal Court of Appeals of Oklahoma; that his petition was denied; and that he thus had exhausted his remedy and means for securing relief in the state courts. By response, the warden pleaded the detention of petitioner for service of the two sentences. Petitioner appeared in open court and testified in his own behalf. Entertaining the view that petitioner had failed to exhaust the remedies available to him, including appellate remedies in the state courts and in the Supreme Court of the United States by appeal or certiorari, the court dismissed the action and petitioner appealed.

Extending over a long period of years, it has been held repeatedly and with emphasis that while a federal court has power to entertain an application for habeas corpus by one detained under a judgment of conviction in a state court for crime alleged to have been obtained in violation of the rights of the accused under the Constitution of the United States, or to grant a writ of habeas corpus for the purpose of inquiring into other cause of restraint of liberty of a [fol. 47] person in custody under authority of a state alleged to be in violation of his rights under the Constitution of the United States, only in rare cases where exceptional circumstances of peculiar urgency are shown to exist will the court entertain a proceeding of that kind unless and until all state remedies available to the petitioner have been exhausted, including the remedy of appeal in the state courts and the remedy in the Supreme Court of the United States by appeal, writ of error, or writ of certiorari. Baker v. Grice, 169 U. S. 284; Tinsley v. Anderson, 171 U. S. 101; Reid v. Jones, 187 U. S. 153; Drury v. Lewis, 200 U. S. 1; Urquhart v. Brown, 205 U. S. 179; Ex parte Spencer, 228 U. S. 652; Ex parte Hawk, 321 U. S. 114; White v. Ragen, 324 U. S. 760. The reason underlying the rule is obvious. It is an exceedingly sensitive and delicate jurisdiction vested in a federal court by which a person convicted in a state court or otherwise detained under authority of the state may be taken from the custody of the officers of the state and finally discharged.

Since the availability of the remedy in habeas corpus in a United States Court to inquire into the detention of one under sentence in a state court alleged to have been obtained in violation of the rights of the accused under the

Constitution of the United States turns on the exhaustion of state corrective processes, where there is substantial doubt as to whether a corrective remedy exists under state processes, or where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy for that purpose, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, a United States Court should entertain the petition for habeas corpus and make disposition of it on its merits. Ex parte Hawk, supra; White v. Ragen, supra; Wade v. Mayo, 334 U. S. 672.

The contention that the sentences imposed in the state court were in violation of the rights of petitioner under the Constitution of the United States was open for presentation on appeal to the Criminal Court of Appeals of Okla- [fol. 48] homa, and in the event of an adverse outcome there, on presentation to the Supreme Court by certiorari. But that corrective process was not exhausted. No appeal was taken to the Criminal Court of Appeals, and no effort was made to present the matter to the Supreme Court of the United States on certiorari. Another remedy for the presentation of the contention was available to petitioner under corrective processes of the state. It could have been presented by an original proceeding in habeas corpus in the Criminal Court of Appeals. Ex parte Barnett, 94 Pac. (2d) 18; Ex parte Meadows, 106 Pac. (2d) 139; In re Stevens, 160 Pac. (2d) 415; Ex parte Snow, 183 Pac. (2d) 588; Ex parte Cook, 183 Pac. (2d) 595. And in the event of an adverse determination, the contention could have been presented to the Supreme Court of the United States on petition for certiorari. Realizing that the remedy of presenting the contention to the Criminal Court of Appeals in an original proceeding in habeas corpus was available, petitioner instituted a proceeding of that nature in which he challenged the validity of the sentences imposed upon him in the state court and sought discharge from further detention on substantially the same grounds that he urges here, with one exception to be noted later. The court entertained the proceeding on its merits but denied the writ. Ex parte Darr, 182 Pac. (2d) 523. And no petition for certiorari was presented to the Supreme Court of the United States.

The single exception to which reference has been made is that here the judgment and sentence in the second case in the state court is attacked on the ground that it is void for the reason that petitioner was induced through fear and by coercive methods of the prosecuting attorney to withdraw his plea of not guilty and enter a plea of guilty. The petition for the writ of habeas corpus which petitioner filed in the Criminal Court of Appeals of the state is not before us, but the opinion in the case, Ex parte Darr, supra, fails to indicate that there the judgment and sentence in the second case was attacked on that ground. If the question is presently open to judicial determination, the remedy of attack-[fol. 49] ing the judgment and sentence on that ground is available to petitioner in an original proceeding in habeas corpus in the Criminal Court of Appeals of the State. Ex parte Barnett, supra; Ex parte, Meadow, supra; In re Stevens, supra; Ex parte, Snow, supra; Ex parte Darr, supra. But as we understand the record, petitioner is not presently serving the sentence in that case. He is now serving the sentence in the first case—in which that question is not present. And it is well settled that the validity of a judgment and sentence in a criminal case is not subject to attack in habeas corpus unless the petitioner is presently detained of his liberty under it. McNally v. Hill, 293 U. S. 131; Kelly v. Aderhold, 112 F. (2d) 118; Macomber v. Hudspeth, 115 F. (2d) 114, certiorari denied, 313 U. S. 558; McMahan v. Hunter, 150 F. (2d) 498, certiorari denied, 326 U. S. 783.

The judgment is Affirmed.

Dissenting Opinion

Phillips, Chief Judge, dissenting:

The order discharging the writ was filed in the lower court on April 22, 1948. At that time, it was regarded as settled law that "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in" the Supreme Court of the United States "by appeal or writ for certiorari, have been exhausted."[1] In other words, certiorari to the Su-

[1] See Ex parte Hawk, 321 U. S. 114, 116 117, and cases therein cited, and the dissenting opinion in Wade v. Mayo, 334 U. S., at p. 687.

preme Court of the United States was regarded as a part of the state remedy for the purposes of the doctrine of exhaustion of state remedies.

As I construe the decision of the trial court, it refused to consider Darr's petition for the writ on the merits, and discharged the writ solely because Darr had not sought review of the decision of the state court in Ex parte Darr, [fol. 50] —— Okl. ——, 182 P.2d 523, by petition for a writ of certiorari.

The opinion in Wade v. Mayo, 334 U. S. 672, came down June 14, 1948. Wade was charged with the offense of breaking and entering. He was tried in the Criminal Court of Record of Palm Beach County, Florida. The jury returned a verdict of guilty and he was sentenced to serve five years in the Florida State Penitentiary.

Immediately before the trial started in the state court, Wade asked the trial judge to appoint counsel to represent him, claiming that it was financially impossible for him to employ counsel. The judge refused the request and the trial proceeded.

On March 16, 1945, two days after the conviction, Wade filed a petition for a writ of habeas corpus in the Circuit Court of Palm Beach County, Florida, in which he set up that the refusal of the judge to appoint counsel for him at the trial on the criminal charge was a denial of due process guaranteed him by the Fourteenth Amendment to the Constitution of the United States. The Circuit Court quashed the writ on authority of two decisions of the Supreme Court of Florida (Watson v. State, 142 Fla. 218, 194 So. 640, and Johnson v. State, 148 Fla. 510, 4 So.2d 671), holding that under Florida law, the trial court had no duty to appoint counsel to represent the accused in a non-capital case. Wade took an appeal from the decision of the Circuit Court to the Supreme Court of Florida. In that court, the Attorney General of the state filed a motion to dismiss the appeal as frivolous on two grounds: (1) that Wade had not appealed from his conviction, or even filed a motion for a new trial in the Criminal Court, and (2) that the Circuit Court had discharged the writ on authority of the two decisions referred to above.

The Supreme Court of Florida dismissed the appeal on May 14, 1945. Wade did not seek review in the Supreme Court of the United States by petition for a writ of certiorari.

[fol. 51] On May 8, 1946, Wade filed an application for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He alleged that the refusal of the Criminal Court to appoint counsel for him deprived him of due process of law guaranteed by the Fourteenth Amendment. That court granted the writ, held that the refusal to appoint counsel rendered the judgment of the state court void, and ordered his discharge.

The Court of Appeals for the Fifth Circuit reversed, holding that the Fourteenth Amendment did not require the appointment of counsel in a non-capital case, unless the state law so required.[2] The Supreme Court granted certiorari.

Darr was charged by information in the district court of Lincoln County, Oklahoma, with the offense of robbery of a bank with firearms. On December 1, 1930, he appeared in person and by counsel, waived the reading of the information, and entered a plea of not guilty. On December 27, 1930, the case was set for trial on January 13, 1931. On January 13, 1931, he appeared and filed an application for a continuance, stating that he was without counsel. Thereupon, the court appointed M. A. Cox, a reputable and able lawyer of Chandler, Oklahoma, to represent him. The trial was continued until the following day.

The offense charged was a serious one. The maximum punishment therefor was death or imprisonment at hard labor in the state penitentiary for a period of not less than five years. See 21 O. S. 1941, § 801. Darr filed a motion for a continuance on the ground that he had not had sufficient time to prepare his defense and procure witnesses. The motion was presentd by Mr. Cox. The trial court denied the motion on the ground that Darr had not exercised due diligence.

On January 16, 1931, the jury returned a verdict of guilty and Darr was sentenced to imprisonment for a period of forty years in the Oklahoma State penitentiary.

[fol. 52] Darr filed a petition for a writ of habeas corpus in the Criminal Court of Appeals of Oklahoma alleging that his detention in the state penitentiary was unlawful because he did not have the means to employ counsel, did not have the aid of counsel, and did not have the aid of counsel of his own choosing in the criminal trial, and because his motion for a continuance on the ground he had not had sufficient

[2] See Mayo v. Wade, 5 Cir., 158 F.2d 614.

time to prepare his defense and procure witnesses was denied by the state court.

The Criminal Court of Appeals, solely on the basis of certified copies of the criminal appearance dockets, held that on January 13, 1931, the court appointed M. A. Cox, a reputable and able lawyer to represent Darr; that Cox ably represented Darr throughout the trial by attacking the sufficiency of the information and the sufficiency of the state's evidence, by requesting a directed verdict, and after verdict by filing and presenting a motion for a new trial; and that the motion for a continuance was denied on the ground that Darr had not exercised due diligence. The Criminal Court denied the writ.

Darr did not seek review of the decision of the Criminal Court of Appeals by petition to the Supreme Court of the United States for a writ of certiorari.

After the time for filing a petition for a writ of certiorari in the Supreme Court of the United States had expired, Darr filed his application for a writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma.

The crime with which Darr was charged was a serious one. As stated above, he might have been punished either by death or imprisonment for a term of not less than five years. Although, through his counsel, he interposed a motion for a continuance on the ground that he had not had sufficient time to prepare a defense or to procure witnesses, the state court denied the motion and put him on trial on the beginning of the court day following the day counsel was appointed for him. These facts present a serious question as to whether the refusal of the trial court to continue the case in [fol. 53] order to give Darr time to consult with his counsel, prepare his defense, and procure witnesses did not result in the denial to Darr of the effective aid of counsel.[3]

I am unable to distinguish the instant case from the Wade case. If I correctly read the opinion in the Wade case, it holds that where a prisoner, who seeks a writ of habeas corpus in a United States District Court, had exhausted his state court remedies but had failed to seek review of the decision of the highest court of the state by a petition to the Supreme Court of the United States for a writ of certiorari,

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[3] Powell v. Alabama, 287 U. S. 45, 68-71.
See Wade v. Mayo, 334 U. S. 672, 680, 681.

such failure is a relevant consideration for the Federal Court in determining whether to entertain the subsequent application for a writ of habeas corpus, but not an absolute bar to the entertainment of such application by the Federal court; and that it is the right and duty of the Federal court to weigh the failure to seek certiorari against the miscarriage of justice that might result from a failure to grant relief and, in the exercise of a sound discretion, determine whether he should entertain or refuse to entertain the subsequent application for a writ of habeas corpus.[4]

I would, therefore, Reverse and Remand to the District Court, with instructions to exercise the discretion with which it is endowed under the decision in the Wade case and determine whether or not it should entertain the application for the writ.

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IN UNITED STATES COURT OF APPEALS

JUDGMENT.

Thirty-Seventh Day, November Term, Monday, January 31st, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the [fol. 54] record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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Clerk's Certificate to foregoing transcript omitted in printing.

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[4] Note, Harv. Law Review, Vol. 62, No. 1, November, 1948, p. 136; 28 U.S.C.A. § 2254;

Canada v. Jones, 8 Cir., ——F.2d—— (decided November 17, 1948).

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1949.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover; Enter John B. Ogden. File No. 53,-715, U. S. Court of Appeals, Tenth Circuit, Term No. 51. Pete Darr, Petitioner, *vs.* C. P. Burford, Warden, Oklahoma State Penitentiary. Petition for writ of certiorari and exhibit thereto. Filed April 11, 1949. Term No. 51 O. T. 1949.

(3250)

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1948**

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**No. [redacted] 51**

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PETE DARR,
*Petitioner,*

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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JOHN J. CARNEY,
516 Fidelity Building,
Oklahoma City, Oklahoma,
*Attorney for Petitioner.*

MARCH, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1948**

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## No.

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PETE DARR,
*Petitioner,*

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,
*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT**
**AND**
**BRIEF IN SUPPORT THEREOF**

---

### PETITION FOR WRIT OF CERTIORARI

Petitioner brings his Petition for Writ of Certiorari to this Court from a judgment of the United States Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, which affirmed a judgment of the United States District Court for the Eastern District of Oklahoma, dismissing a Petition

for *Habeas Corpus* without making an inquiry into petitioner's detention or want of merit and his deprivation of due process of law, as provided by the Bill of Rights of the State of Oklahoma, Article 2, Section 20, Oklahoma Constitution, and in contravention of the 5th and 14th Amendments to the Constitution of the United States: but affirmed the judgment of the United States District Court for the sole and only reason that petitioner had not exhausted his state remedies.

Majority opinion by two Circuit Judges, affirming, and Chief Judge dissenting, which expressed the views that the trial court failed to consider Darr's petition for the writ on its merits, which writ was discharged on April 22, 1948. Supporting said dissenting opinion, Chief Judge quotes *Wade* v. *Mayo*, 334 U.S. 672, which opinion came down June 14, 1948, and is in part, as follows:

> "That failure to seek review of the decision of the highest court of the state by writ of *certiorari*, such failure is a relevant consideration for the federal court in determining whether to entertain the subsequent application for a writ of *habeas corpus*, but not an absolute bar to the entertainment of such application by Federal court; and that it is the right and duty of the Federal court to weigh the failure to seek *certiorari* against any miscarriage of justice that might result from a failure to grant relief."

*Powell* v. *Alabama*,
287 U.S. 45;
*Whitaker* v. *Johnson*,
85 Fed. (2d) ____;
*Ex parte Hawk*,
321 U.S. 114-17;
*Tony Marino* v. *Joseph E. Ragen*,
68 Sup. Ct. 240.

Your petitioner, Pete Darr, therefore, prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals, Tenth Circuit, to review a judgment of that court entered January 31st, 1949, not officially reported at this date.

A Certified Transcript of the Record in this case, including the proceedings in the United States Circuit Court of Appeals, Tenth Circuit, is furnished herewith, in accordance with the rules of this Court.

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## JURISDICTION

The opinion of the United States Circuit Court of Appeals was filed January 31, 1949. Jurisdiction of the court to issue the writ applied for is invoked under Title 28, U.S.C.A. 453. And because a substantial Federal question as to restraint without due process of law under the 14th Amendment [*Hawk* v. *Olson*, 324 U.S. 839], all of which was denied petitioner.

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## SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner was charged by two separate and distinct informations with robbery with figearms, issued out of the District Court of Lincoln County, Oklahoma. On January 9, 1931, petitioner, who had previously waived his preliminary hearing, was brought to Chandler, Oklahoma, from the State Penitentiary at McAlester, Oklahoma, and placed in jail and held incommunicado until the morning of January 13, on which date the two said cases were set for trial; that on said date, petitioner made application to the District

Court for a continuance in order to prepare for trial, subpoena witnesses, and that he had just been informed his counsel would not appear for him in the trial, and that other counsel had just been assigned to him and asked for time to prepare his defense; that he had no funds to employ counsel, or to subpoena witnesses on account of his incarceration in the state penitentiary (Tr. 9-10).

Petitioner alleges that on January 13, 1931, the court found that he was without counsel and without funds to employ counsel, and on said date appointed counsel to defend him, and continued the case until the following morning. With those conditions existing, petitioner was forced to trial wholly unprepared, and confronted with a hostile atmosphere, and with 34 witnesses subpoenaed to testify against him in the first case, and 19 in the second case, and not a single witness in behalf of petitioner. We contend that petitioner was convicted in violation of his constitutional rights contained in the Bill of Rights of the State of Oklahoma, Article 2, Section 20, in that petitioner was not furnished with a list of witnesses, together with their postoffice addresses to be used in chief against him, although petitioner requested the county attorney to furnish him with said list of witnesses. Petitioner further alleges that the postoffice addresses of witnesses were not endorsed on either of the two informations filed against him.

We further contend that petitioner was convicted in contravention of the 5th and 14th Amendments of the Constitution of the United States. In support of our contention, the record discloses that petitioner was tried on

January 14th, and jury empanelled on said date; that he had no counsel of his own choosing, and his appointed counsel had no time to prepare for trial; that the jury returned a verdict of guilty and assessed punishment at confinement in the penitentiary for a period of 40 years at hard labor, and the judge set January 16, for date of sentence, but petitioner was sentenced on January 15 (See Record of Judgment, p. 16). Denial of effective assistance of counsel in prosecution in state court violates due process.

U.S.C.A., Const. Amend. 14.

The offense charged was a serious one. The maximum punishment therefor was death or imprisonment at hard labor in the state penitentiary. See 21 O. S. 1941, Sec. 801. The defendant needs counsel and counsel needs time.

*Tompkins* v. *Missouri*,
323 U.S. 485;
*Palko* v. *Connecticut*,
302 U.S. 327;
*Hawk* v. *Olson*,
321 U.S. 144;
*Powell* v. *Alabama*,
287 U.S. 45;
*Moore* v. *Dempsey*,
261 U.S. 86;
*Baker* v. *State*,
130 Pac. 820;
*Commonwealth* v. *O'Keefe*,
148 Atl. 75;
*Glasser* v. *United States*,
315 U.S. 60.

When the life of a man hangs in the balance, he is entitled to the fullest measure of due process of law, and

the aid of counsel at every step of the proceedings to guide him along the complicated labyrinths of the law.

Thereafter, and on January 14, 1931, petitioner was brought before the same court at Chandler, Oklahoma, on the second charge of robbery with firearms, and jury empanelled to try said cause. The State introduced two witnesses and petitioner could introduce none.

Petitioner was held in jail at Chandler, Oklahoma, awaiting the verdict, and on the following morning the County Attorney visited him, and suggested that petitioner plead guilty, and petitioner refused. The County Attorney then informed petitioner if he would enter a plea of guilty, he could obtain for him a sentence of only ten years to run concurrently with the former sentence of 40 years. Petitioner still refused to plead guilty. Whereupon the County Attorney informed him if he did not plead guilty to said charge he stood to get the electric chair on account of the bitter feeling against him; and further informed petitioner that the court or the jury could, upon conviction of the crime with which he was charged, assess the death penalty against him. This fact was testified to by petitioner on February 8, 1948, before Honorable Eugene Rice, U. S. District Judge, and no denial was made of this allegation (Tr. 22-23). This startling disclosure of the law, under which petitioner was being tried, horrified your unlearned petitioner, and deprived him of his reason and judgment, and left him subservient to the suggestions of the County Attorney, and while laboring under such feeling of terror that he might receive the death sentence, and relying on the

promises of the County Attorney, he agreed to enter a plea of guilty. Petitioner was thus coerced into pleading guilty to the last named charge and before the jury returned a verdict. Petitioner not only was coerced into pleading guilty under fear of receiving the death penalty but was coerced into pleading guilty by the alleged community hostility against him.

Petitioner appeared before the court on the same date and entered his involuntary plea of guilty to the charge; that after being informed by the court, that he would sentence him to a term of 40 years at hard labor to run consecutively to the 40 years already imposed upon him, petitioner attempted to withdraw his guilty plea; but the court denied said plea and immediately sentenced petitioner to a term of 40 years in the State Penitentiary at McAlester, Oklahoma, on the last named charge to run consecutively as to the first sentence of 40 years already imposed upon him.

*Kercheval* v. *United States*,
274 U.S. 220;
*Jack Walker* v. *James A. Johnston*,
85 L. ed. 830, 312 U.S. 275;
*Glasser* v. *United States*,
315 U.S. 60;
*Smith* v. *O'Grady*,
312 U.S. 329;
*State* v. *Brown*,
266 Pac. (2d) 475;
*Williams* v. *Kaiser*,
323 U. S. 471;
*Moore* v. *Dempsey*,
261 U.S. 86;

*Von Molke* v. *Gillies*,
332 U.S. 708;
*De Meerleer* v. *Michigan*,
329 U.S. 663.

We urge that the case of *Von Molke* v. *Gillies* presents a serious constitutional question on behalf of petitioner Darr, on his plea of guilty.

The Criminal Court of Appeals denied the original writ solely on the basis of certified copies made by the clerk, which were never authenticated by the trial judge. No transcript was ever made of the proceedings of the trial.

Petitioner had no funds with which to make an appeal from his conviction and no friends to aid him; he was rushed to the penitentiary and had no opportunity to appeal.

*Waley* v. *Johnston*,
316 U.S. 101;
*Johnson* v. *Zerbst*,
304 U.S. 458.

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## QUESTIONS PRESENTED

1. May the courts below, in view of all the decisions presented by petitioner in support of his contention that he was deprived of due process of law, contrary to the Bill of Rights as revealed by the record, and in contravention of the 5th and 14th Amendments to the Constitution of the United States, refuse to consider his petition upon its merits?

2. Is denial of petitioner's writ under all the facts pleaded and supported by the Record, in accord with due process of law?

3. Shall petitioner be denied relief, and doomed to spend the remainder of his life behind the dark prison walls on account of a mere technical suggestion, which appears to have been overruled by this Honorable Court?

*Rice* v. *Olson*,
324 U.S. 786;
*Wade* v. *Mayo*,
334 U.S. 672.

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**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT**

Your petitioner believes that a writ of *certiorari* should be granted in this case for the reason that petitioner was denied the rights afforded him under the Constitution and laws of the State of Oklahoma, contained in the Bill of Rights, Art. 2, Sec. 20, Oklahoma Constitution, and the 5th and 14th Amendments of the Constitution of the United States.

The majority opinion of the court below appears to be in conflict with a recent decision of this Court, *Wade* v. *Mayo*, 334 U.S. 672, and many other opinions heretofore rendered and herein referred to when a Federal right has been claimed in the courts, it is, we believe, the province of this Court to inquire into the very truth and substance of his detention.

*Wade* v. *Mayo*;
334 U.S. 672;
*Lewis Lutz* v. *Joseph E. Ragen*,
325 U.S. 768;

*Commonwealth* v. *O'Keefe*,
148 Atl. 75;
*Frank* v. *Mangum*,
237 U.S. 309;
*Johnson* v. *Zerbst*,
304 U.S. 458;
*State ex rel. Tucker* v. *Davis*,
130 Pac. 962;
*Ex parte Stinnett*,
110 Pac. (2d) 310;
*Norris* v. *Alabama*,
294 U.S. 587;
*Powell* v. *Alabama*,
287 U.S. 45.

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**PRAYER**

WHEREFORE, your petitioner respectfully prays that this Court as the final arbiter of questions arising under the 5th and 14th Amendments of the Constitution of the United States, issue a writ of *certiorari* to the United States Circuit Court of Appeals, Tenth Circuit, to the end that this cause may be reviewed and determined by this Court, according to law, and that your petitioner may have such other and further relief as this Court may deem just and proper.

By his attorneys,

JOHN B. OGDEN,
Colcord Building,

JOHN J. CARNEY,
516 Fidelity Bldg.,
Oklahoma City, Oklahoma.

MARCH ....., 1949.

**CERTIFICATE**

I, the undersigned counsel for petitioner, hereby certify that I have examined the foregoing petition for *certiorari*, and that it is my opinion the same is well founded and entitle to the favorable consideration of this Court.

JOHN B. OGDEN,
Colcord Building.

JOHN J. CARNEY,
516 Fidelity Building,
Oklahoma City, Oklahoma,
*Attorney for Petitioner.*

MARCH ....., 1949.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### OPINIONS OF THE COURTS BELOW

The United States District Court for the Eastern District of Oklahoma, without expressing any opinion upon the merits of petitioner's contentions, denied relief, and discharged the writ, for the sole reason he had failed to exhaust his state remedies. Dated April 22, 1948.

From which order an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, on May 1, 1948. Judgment is found at Tr. 16.

The opinion of the United States Circuit Court of Appeals, Tenth Circuit, has not yet been officially reported, but may be found at Tr. 45-53, inclusive.

### JURISDICTION

The judgment of the United States District Court for the Eastern District of Oklahoma, was rendered on April 22, 1948 (Tr. 45-53 inc.).

The judgment of the United States Circuit Court of Appeals, Tenth Circuit, was entered January 31, 1949. This Court's jurisdiction is found in 28 U.S.C.A. 453.

### STATEMENT OF THE CASE

The statement of facts as recited in the preceding petition under the heading "Summary Statement of the Matters Involved" is sufficient understanding of the grounds urged

for the allowance of the writ, and that statement of facts is hereby adopted and made a part of this brief.

## SPECIFICATIONS OF ERROR

The statements in the petition of the questions presented and the reasons relied on for the allowance of the writ show the errors intended to be urged. In the interest of brevity they will not be repeated here.

## ARGUMENT

Under the caption, "Statement of Matters Involved," a brief synopsis is given of the salient points of petitioner's trial and conviction, and his plea of guilty, which the undisputed facts reveal was under duress, and in which we cite many opinions in support of our contention that both judgments were contrary to the Bill of Rights, of the Oklahoma Constitution, and in contravention of the 5th and 14th Amendments of the Constitution of the United States, and that said judgments were therefore void, for want of due process of law.

Our Constitution and Bill of Rights call for a careful and sympathetic observance of due process of law that is guaranteed to all accused persons; and that observance was not afforded petitioner.

In the dissenting opinion of the Chief Judge of the United States Circuit Court of Appeals, Tenth Circuit, we find this opinion provides a suggestive answer to the contention that petitioner failed to seek relief in the Supreme

Court of the United States by *certiorari*; supported by a very recent opinion. *Wade* v. *Mayo*; 334 U.S. 672.

And in further support of the objection to the essential question raised in the courts below, we quote the case entitled:

*Herman Metz Waley* v. *Jas. A. Johnston*,
316 U.S. 101, and

further a recent case entitled:

*Tony Marino* v. *Joseph E. Ragen*,
68 Sup. Ct. 240.

This case, we believe is not only applicable to the State of Illinois, but decides fundamental principles of law in petitioner's case before this Court.

In the second case the decision to plead guilty was made through coercion and promises of leniency, and was therefore, involuntary. It would be a strain on credulity to believe that petitioner would voluntarily plead guilty while the jury was still deliberating, for to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing; a decision which forecloses any possibility of establishing innocence. The Record fails to show that petitioner had any effective assistance from his appointed counsel in his hour of distress and peril (Tr. 28-29).

Petitioner was not informed by either the County Attorney, or his appointed counsel that it was not within the province of the trial judge to accept any statements, or promises of leniency made by the County Attorney to the

petitioner, and the Record fails to reveal he was apprised of the consequences of his plea by the trial judge.

The undisputed facts herein reveal that petitioner was not convicted in accordance with "due process of law," of the charge of Robbery with Firearms, when he was sentenced to serve 40 years in the State Penitentiary at hard labor, and on an involuntary plea of guilty, for which he received an additional sentence of 40 years to run consecutively with the first sentence.

We therefore contend that both sentences are and were void.

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## CONCLUSION

Certified copies of Informations under which petitioner was tried and convicted were before the courts below. In said Informations Pete Darr, Herman Chevreaux, Les Cargo and Ted Johnson were charged *jointly* with Robbery with Firearms.

Under said Informations Pete Darr received a sentence of 80 years at hard labor; Herman Chevreaux received only a light sentence, and was released many years ago, along with Ted Johnson; Les Cargo was killed on the streets of Oklahoma City, Oklahoma, before being served with a warrant.

We present the undisputed facts to this Honorable Court for the express and only purpose of further showing that this uneducated and bewildered petitioner appearing in a hostile atmosphere, without witnesses in his behalf, was

not accorded a fair and impartial trial at any stage of the proceedings.

It is therefore respectfully urged that this case is one calling for the exercise by this Court of its supervisory powers and that a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN B. OGDEN,
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Oklahoma City, Oklahoma,
*Attorneys for Petitioner.*

MARCH, 1949.

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

**No. 51** 51

PETE DARR,
*Petitioner,*

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,
*Respondent.*

## BRIEF OF PETITIONER

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NOVEMBER, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

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## No. 51

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PETE DARR,
*Petitioner,*

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,
*Respondent.*

---

## BRIEF OF PETITIONER

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### BRIEF AND ARGUMENT

MAY IT PLEASE THE COURT:

The United States District Court for the Eastern District of Oklahoma, without expressing any opinion upon the merits of petitioner's contentions, denied relief, and discharged the writ, for the sole reason he had failed to exhaust his state remedies. Dated April 22, 1948.

From which order an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, on May 1, 1948. Judgment is found at Tr. 16.

The opinion of the United States Circuit Court of Appeals, Tenth Circuit, was entered January 31, 1949 (Tr. 53). From this judgment petitioner brings his petition for *certiorari* before this Honorable Court, and prays for a review of said judgment, which order for review was granted June 6, 1949.

## JURISDICTION

Jurisdiction of the Court to issue the writ applied for is invoked under Title 28, U.S.C.A. 453.

We quote from the Memorandum and Order of the Honorable Eugene Rice, United States District Judge as follows:

> "Sufficient it is to say that his petition was adequate to invoke the jurisdiction of this court to issue the writ. 28 U.S.C.A. 453" (Tr. 16).

And because a substantial Federal question as to restraint without due process of law under the 14th Amendment to the Constitution of the United States seemed to be presented.

*Ex parte Hawk*, 321 U.S. 114-117;
*Whittaker* v. *Johnston*, 85 Fed. (2d) 199.

## STATEMENT OF THE CASE

In the interest of brevity we give a short synopsis of the trial and conviction of petitioner in the State Court of

Oklahoma, and to bring before this Court the denial of "Due Process of Law" to petitioner under the 5th and 14th Amendments to the Constitution of the United States and the Bill of Rights contained in the Constitution of the State of Oklahoma.

Petitioner was charged by two separate and distinct informations with the capital crime of robbery with firearms, issued out of the District Court of Lincoln County, Oklahoma. On January 9, 1931, petitioner, who had previously waived his preliminary hearing, was brought to Chandler, Oklahoma, from the State Penitentiary at McAlester, Oklahoma, and placed in jail and held incommunicado until the morning of January 13, on which date the two said cases were set for trial; that on said date, petitioner made application to the District Court for a continuance in order to prepare for trial, subpoena witnesses; that he had just been informed his counsel would not appear for him in the trial, and that other counsel had just been assigned to him and asked for time to prepare his defense; that he was without funds to employ counsel or to subpoena witnesses on account of his incarceration in the State Penitentiary (Tr. 9-10).

Petitioner alleges on January 13, 1931, the court found that he was without counsel and without funds to employ counsel, and on said date appointed counsel to defend him and continued the case until the following morning.

In petitioner's distressful and totally unprepared condition he was forced to trial on the following day, to-wit:

January 14th, without even one witness in his behalf, and confronted by a hostile community, and 34 witnesses to testify against him, and petitioner was not furnished with the list of witnesses to be used in chief against him, together with their postoffice addresses, as required under the Bill of Rights, of the Oklahoma Constitution.

That on said date, January 14th, petitioner was tried before a jury empanelled on said date, his appointed counsel had no time to prepare for trial, and the jury found him guilty, and assessed his punishment at confinement in the State Penitentiary for a term of 40 years at hard labor; and the judge set January 16th, 1931 for date of sentence; but petitioner was sentenced on January 15th (Tr. 6).

That thereafter and on January 14th, 1931, petitioner was brought before the same court and jury empanelled to try him on the second charge; that out of the 19 witnesses for the State, the State used only two, and petitioner had none. Petitioner was held in the jail at Chandler, Oklahoma, awaiting the verdict of the jury, when the County Attorney visited him in the jail, and suggested to him that he plead guilty. This the petitioner refused to do. The County Attorney then informed petitioner, if he would plead guilty he could obtain for him a sentence of only 10 years to run concurrently with the former sentence of 40 years (Tr. 22); petitioner still refused to plead guilty. Then the County Attorney told him if he did not plead guilty he stood to get the electric chair, on account of the bitter feeling against him. It was then through fear of receiving the death penalty that petitioner

agreed to enter a plea of guilty. Petitioner did not and could not under those conditions waive any of his Constitutional rights; that on said date petitioner appeared before the court to enter his plea of guilty; that after being informed by the court that he would sentence him to a term of 40 years to run consecutively with the first sentence of 40 years, petitioner attempted to withdraw his plea of guilty; but the court refused to allow him to withdraw his plea and immediately sentenced him to a term of 40 years at hard labor.

## SPECIFICATIONS OF ERROR

The reasons relied on for the allowance of the Writ, show the errors intended to be urged and particularly the Honorable Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, in its majority opinion failed to give due consideration to the merits of the case.

## ARGUMENT

Under the caption "Statement of the Case," a brief synopsis is given of the salient points of petitioner's trial and conviction, and his plea of guilty, which the undisputed facts reveal was under duress, which is the basis of our contention that both judgments were contrary to the Bill of Rights of the Oklahoma Constitution, and in contravention of the 5th and 14th Amendments to the Constitution of the United States, and that said judgments were therefore void for want of due process of law.

From Article 2, Section 21, Bill of Rights, 1941 Statutes of Oklahoma (R. 5-37), we quote in part:

> "Accused shall be informed of the nature and cause of the accusation against him, and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of witnesses that will be used in chief against him, together with their postoffice addresses."

Authenticated copy of record fails to show appellant was served with a list of witnesses.

Does the record and evidence disclose due process of law? Article 2, Section 7, of the Oklahoma Constitution, provides:

> "No person shall be deprived of life, liberty or property, without due process of law."

This principle is older than written constitutions. The phrase "due process of law" as used in the Bill of Rights is synonymous with the "Law of the Land" as found in Magna Charta. By the "Law of the Land" is clearly intended the general law which hears before it condemns, which proceeds upon inquiry and renders judgment, only after a fair and legal trial.

Pete Darr, appellant did not have a fair and legal trial, and was tried in contravention of the 5th and 14th Amendments to the United States Constitution which read in part as follows:

Fifth Amendment:

> "No person shall be deprived of life, liberty, or property, without due process of law," and

The 14th Amendment provides in part:

"Nor shall any State deprive any person of life, liberty or property, without due process of law."

Appellant was transported from the State Penitentiary by order of the court, to Chandler, Lincoln County, Oklahoma, on January 9th, 1931, and placed in jail, where he remained incommunicado until the morning of January 13th, the day the cases were set for trial; that during all the intervening time, appellant had no counsel to advise him and made no preparation for trial; that appellant did not know the appointed counsel (see bottom of page 36 of Record).

In support of our contention, as above stated, we quote:

Constitutional Law:

"Denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."

U.S.C.A., and quoting further:

"Denial of effective assistance of counsel in prosecution in state court violates due process."

U.S.C.A., Const. Amend. 14.

We herewith quote from the body of the opinion of the case of *Henry Hawk* v. *Neil Olson, Warden of the State Penitentiary at Lancaster, Nebraska*, reported in 90th Law ed. 61, which reads:

"Your petitioner had no consultation whatsoever with either of the aforesaid public officials regarding his defense; they picked the jury and testimony was adduced and continuance or recess taken until the fol-

lowing morning * * *. Petitioner claimed protection of the Fourteenth Amendment.

"These facts, if true, we think, set out a violation of the Fourteenth Amendment * * *.

"Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights, he has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires."

Supporting our contention that appellant was forced to trial, without sufficient time to prepare for trial, although being charged with two capital crimes, and having no counsel of his own choosing, and his request for continuance in order to subpoena witnesses from another county, we cite Exhibit A, page 9 of the Record. Said Application bearing date January 13th, 1931, Case No. 2199; and Application for Continuance in Case No. 2197, same date at (R. 10) Exhibit B. Order appointing counsel January 13th (R. 10). Petitioner made application to have two witnesses subpoenaed from another county to testify in his behalf. Exhibit C (R. 12-14). Said subpoenaes were issued January 13th, and returned marked "Persons not found in said county."

In support of point two, we quote *Powell* v. *Alabama*, 287 U.S. 45, 158 L. ed. 84:

Syllabus 4:

"The right of one charged with crime to be represented by counsel includes a fair opportunity to be represented by counsel of his own choice."

Syllabus 5:

"One charged with crime is as much entitled to assistance of counsel in preparing for trial as at the trial itself."

And we further quote *Glasser* v. *U. S.*, 315 U.S. 60, 86 L. ed. 681:

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney *devoted solely to his client.*
>
> *"Even as we have held the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law, contrary to the 14th Amendment. Powell* v. *Alabama*, 287 U.S. 45, *supra.*"

From the case of *Lewis Lutz* v. *Joseph E. Ragen, Warden of the State Penitentiary of Illinois*, 89 L. ed. 1348, 325 U.S. 768, we quote Syllabus 3:

> "CONSTITUTIONAL LAW —DUE PROCESS—DENIAL OF ASSISTANCE OF COUNSEL.
>
> "Due process requires that the defendant on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel and that he shall not be forced into trial with such expedition as to deprive him of the effective assistance of counsel."

In the case of *Baker* v. *State* (Okla. Cr.), 130 Pac. 820, in an opinion by Judge Thomas Doyle, of the Criminal Court of Appeals of Oklahoma, we quote:

> "The right to be heard by counsel would in the language of Saint Paul. I Cor. 13, 'become as sounding brass, or tinkling cymbal' if it did not include the right to a full and confidential consultation with counsel, with no other persons present."

The court appointed M. A. Cox, attorney to represent appellant, on January 13th, after finding petitioner was

without counsel or funds to employ counsel, and continued the case until the following day. Appellant was forced to trial without preparation and without a witness in his behalf. In support of the above (R. 38), we quote from the case of *Commonwealth* v. *O'Keefe*, 148 Atl. 75, Syllabus 1:

> "Action of a trial court in forcing defendant to trial on day of arrest notwithstanding counsel's statement regarding impossibility of being prepared for trial deprived defendant of constitutional right."

Justice Sutherland quotes with approval a portion of an opinion by the Supreme Court of Pennsylvania, in the above case:

> "It is vain to give an accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter the opportunity to acquaint himself with the law or facts."

Syllabus 2:

> "Constitutional law, due process of law requires ample notice to accused and sufficient time, to secure counsel and prepare for defense."

We quote from *Tompkins* v. *Missouri*, 323 U.S. 485:

> "The defendant needs counsel and counsel needs time.",

Quoting from *State ex rel. Tucker* v. *Davis et al.* (Okla. Cr.), 130 Pac. 962:

> "There is no such thing as due process of law, if a party has been deprived of an opportunity to prepare for trial. * * *"

In the case of *Ex parte Stinnett* (71 Okla. Cr.), 110 Pac. (2d) 310, opinion by Judge Thomas Doyle, we quote:

Syllabus by the court. Sec. 2:

> "In our opinion the Constitutional right to be represented by counsel and the right in capital cases, at least two days before the case is called for trial to be furnished with a list of witnesses, together with their post office addresses are essential to *due process of law*, guaranteed the citizen by Sec. 7, Bill of Rights. We are inclined to think that a conviction had by a denial of these constitutional rights simply amounts to judicial lynch law."

We further contend that petitioner was convicted in contravention of the 5th and 14th Amendments to the Constitution of the United States. In support of our contention the Record discloses that petitioner was tried on the first charge on January 14th and jury empanelled on said date; that he had no counsel of his own choosing and his appointed counsel had no time to prepare for trial; that the jury returned a verdict of guilty and assessed punishment in the penitentiary for a term of 40 years at hard labor and the judge set January 16th for date of sentence, but petitioner was sentenced on January 15th (R. 16). The offense charged was a serious one. The maximum punishment therefor was death or life imprisonment at hard labor.

When the life of a man hangs in the balance, he is entitled to the fullest measure of due process of law, and the aid of counsel at every step of the proceedings to guide him along the complicated labyrinths of the law.

We assert there was a flagrant denial under the due process clause afforded petitioner, on account of the fact he was held incommunicado in the county jail from Jan-

uary 9th, to January 13th, 1931, believing his counsel would appear for him, on which date the two said cases were set for trial; when he was informed his counsel would not appear, and on said date the court found petitioner was without funds and appointed counsel to defend him, and denied plaintiff's plea for a continuance in order to prepare for trial (Tr. 10), which plea was made on January 13th. In overruling plaintiff's plea for continuance, the court states that "Plaintiff had not exercised due diligence."

Thereafter, and on January 14th, 1931, petitioner was brought before the same court at Chandler, Oklahoma, on the second charge of robbery with firearms, and jury empanelled to try said cause. The State introduced two witnesses and petitioner could introduce none.

Petitioner was held in jail at Chandler, Oklahoma, awaiting the verdict, and on the following morning the County Attorney visited him, and suggested that petitioner plead guilty, and petitioner refused. The County Attorney then informed petitioner if he would enter a plea of guilty, he could obtain for him a sentence of only ten years to run concurrently with the former sentence of 40 years. Petitioner still refused to plead guilty. Whereupon the County Attorney informed him if he did not plead guilty to said charge he stood to get the electric chair on account of the bitter feeling against him; and further informed petitioner that the court or the jury could, upon conviction of the crime with which he was charged, assess the death penalty against him. This fact was testified to by petitioner on

February 8, 1948, before Honorable Eugene Rice, U. S. District Judge, and no denial was made of this allegation (Tr. 22-23). This startling disclosure of the law, under which petitioner was being tried, horrified your unlearned petitioner, and deprived him of his reason and judgment, and left him subservient to the suggestions of the County Attorney, and while laboring under such feeling of terror that he might receive the death sentence, and relying on the promises of the County Attorney, he agreed to enter a plea of guilty. Petitioner was thus coerced into pleading guilty to the last named charge and before the jury returned a verdict. Petitioner not only was coerced into pleading guilty under fear of receiving the death penalty but was coerced into pleading guilty by the alleged community hostility against him.

Petitioner appeared before the court on the same date and entered his involuntary plea of guilty to the charge; that after being informed by the court, that he would sentence him to a term of 40 years at hard labor to run consecutively to the 40 years already imposed upon him, petitioner attempted to withdraw his guilty plea; but the court denied said plea and immediately sentenced petitioner to a term of 40 years in the State Penitentiary at McAlester, Oklahoma, on the last named charge to run consecutively as to the first sentence of 40 years already imposed upon him.

*Rice* v. *Olson*,
324 U.S. 786;

*Kercheval* v. *United States*,
274 U.S. 220;

*Jack Walker* v. *James A. Johnston*,
85 L. ed. 830, 312 U.S. 275;

*Glasser* v. *United States*,
315 U.S. 60;

*Smith* v. *O'Grady*,
312 U.S. 329;

*State* v. *Brown*,
266 Pac. (2d) 475;

*Williams* v. *Kaiser*,
323 U.S. 471;

*Moore* v. *Dempsey*,
261 U.S. 86;

*Von Molke* v. *Gillies*,
332 U.S. 708;

*De Meerleer* v. *Michigan*,
329 U.S. 663.

Appellant states he was not only coerced into pleading guilty in the last numbered charge by the statements made to him by the County Attorney, but was coerced by the alleged community hostility against him; and therefore did not waive any of his constitutional rights. We believe it would therefore be a strain on credulity to believe appellant voluntarily pleaded guilty and while the jury was still deliberating.

We cite the case of *Von Molke* v. *Gillies*, opinion dated January 19, 1948, 332 U.S. 708.

This case we deem very essential, and of great importance for the correct and legal determination of the case before this Honorable Court. For that reason, we earnestly suggest that the Court give its most serious consideration to this opinion in its entirety.

*Jack Walker, petitioner* v. *James A. Johnston, Warden, United States Penitentiary, Alcatraz, defendant*, 85 L. ed. 830, Syllabus 4:

"One convicted of a crime upon a plea of guilty without having the aid of counsel is deprived of a constitutional right if he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the public prosecutor into entering a plea of guilty."

"In a state prosecution, a conviction on a plea of guilty obtained by a trick, will not support a conviction."

*Smith* v. *O'Grady*,
85 L. ed. 859.

From the case of *State* v. *Brown* (Okla. Cr.), 266 Pac. (2d) 475, we quote Syllabus 2:

"PLEA OF GUILTY.

"Plea of guilty should be entirely voluntary and be made by one competent to know the consequences thereof. Plea of guilty should not be accepted by a court until the defendant has been fully advised of his rights and the consequences thereof."

*Albert Smith* v. *Joseph O'Grady, Warden*, 312 U.S. 329, 85 L. ed. 859:

"That he be given proper opportunity to defend himself but was rushed to the penitentiary where his ignorance, confinement and proverty precluded the possibility of an appeal in order to challenge the procedure by regular process of appeal."

We also quote *Johnston* v. *Fred Zerbst, Warden*, 82 L. ed. 1461:

Syllabus:

"*Habeas corpus* is an available remedy to one who without having waived his right to assistance of counsel, has been convicted and sentenced, and to whom

expiration of time has rendered relief by an application for a new trial or by appeal unavailable."

Quoting further from the case of *Johnston* v. *Zerbst*, in the body of the opinion, the court said:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost justice will not still be done. It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty wherein the prosecution is presented by experienced and learned counsel.

"The Sixth Amendment withholds from Federal Courts in all criminal proceedings the power and authority to deprive an accused of his life or liberty unless he waives the assistance of counsel. *He requires the guiding hand of counsel at every step in the proceeding against him.*"

The Criminal Court of Appeals denied the original writ solely on the basis of certified copies made by the Clerk of Lincoln County, Oklahoma, which were never authenticated by the trial judge. No transcript was ever made of the proceedings of the trial.

Petitioner had no funds with which to make an appeal from his conviction and no friends to aid him and was rushed to the penitentiary and had no opportunity to appeal.

This unfortunate person is uneducated, illiterate, having lived on a tenant farm in the Chickasaw Nation; left without a father at the age of 14 years, with five younger children and mother dependent upon him for support.

*Johnston* v. *Zerbst*,
304 U.S. 458-66;

*Moore* v. *Dempsey*,
261 U.S. 86;

*Williams* v. *Kaiser*,
323 U.S. 471.

*APPELLANT CONTENDS* that he exhausted his State remedies before applying to the Federal Court for writ of *habeas corpus*.

Under authority of Congress, our Federal Courts have liberalized jurisdiction in *habeas corpus* proceedings, and in support of this fact, we quote from *Ex parte Hawk* v. *Olsen*, 321 U.S. 144, Syllabus 8:

> "Where resort to state court remedies has failed to afford full and fair adjudication of federal contentions raised by one detained under state court judgment of conviction, either because state affords no remedy or because in particular case remedy afforded by state law proves in practice unavailable or seriously inadequate, *a federal court should entertain petition for habeas corpus*, but in such case petitioner should proceed in federal district court before resorting to United States Supreme Court."

In the body of the opinion, the Court said:

> "Since relief was denied petitioner Hawk in the above cause, for the reason he had failed to exhaust all his state remedies, the same Henry Hawk filed a writ of *certiorari* to the Supreme Court of Nebraska, which order denying a writ of *habeas corpus* was affirmed by said Supreme Court of Nebraska, and the petitioner brings *certiorari*." [Reversed and remanded, 324 U.S. 839; opinion by Justice Reed].

*Frank* v. *Mangum*, 237 U.S. 309, which we quote in part:

> "This court has recognized that *habeas corpus* in the Federal Courts of one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringment through any violation of the Constitution,' even though the events which were alleged to infringe did not appear on the face of the record of his conviction."

This, we deem a very important case in favor of appellant, not only conclusive that he has exhausted his state remedies, but applies to the various phases of his case, set forth in points herein designated and heretofore referred to.

We quote further the case of *Whitaker* v. *Johnston*, 85 Fed. (2d) 199, Syllabus 2:

> "Petition for writ of *habeas corpus* from Circuit Court of Appeals was denied where it had not been made in first instance in District Court of United States (Wilbur, Circuit Judge). It has already been pointed out this is the proper procedure. *Ex parte Davis*, 54 Fed. (2d) 723."

We quote herewith Syllabus 1 from the case of *Frank Moore et al.* v. *E. H. Dempsey, Keeper, Arkansas State Penitentiary*, 261 U.S. 86, 67 L. ed. 543:

> "The corrective process afforded by the court in case alleged murderers are rushed to conviction through counsel, judge and jury being swept to the fatal end by an irresistible wave of public opinion so that no trial in the true sense of the word was offered, will not, where such measures have been appealed to without affording relief prevent a Federal Court from issuing a writ of *habeas corpus*."

The above case was appealed from an order of the District Court of the United States for the Eastern District

of Arkansas, dismissing a writ of *habeas corpus* to secure release of prisoner after conviction of murder. Opinion by Justice Holmes.

In supporting further our contention that our Federal Courts have liberalized the use of *habeas corpus*, and as a result thereof a prisoner in custody may have a judicial inquiry into the very truth and substance of the causes of his detention, we quote *Johnston* v. *Zerbst*, 304 U.S. 458-466, in part:

> "These principles must be construed, however, and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. *The scope of inquiry in the habeas corpus proceedings has been broadened — not narrowed since the adoption of the 6th Amendment.* In such a proceeding it would be *clearly erroneous to confine the inquiry to the proceedings and judgment of a trial court* and *the petitioned court has the power to inquire with regard to the jurisdiction of the inferior court*; either in respect to the subject matter or to the person, even if such inquiry (involves) an examination of facts outside of, but not inconsistent with the record.
>
> "Congress has expanded the rights of a petitioner for *habeas corpus* and the 'effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common law practice.' "

From the recent case of *Tony Marino* v. *Joseph E. Ragan, Warden Illinois State Penitentiary*, 68 S. Ct. 240, we quote:

> "This case sharply points up a much larger problem of growing concern to this Court, than merely the disposition to be made of Marino's petition in view of the state's confession of error. I agree that relief is due him and I join in the Court's opinion."

From the body of the opinion:

"The exhaustion of state remedies rule should not be stretched to the absurdity of requiring the exhaustion of three separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the three is appropriate or effective. That each is severely restricted is clear. That any one is available as a matter of right is by no means clear and even if each has a limited function exclusive of the other two, it may be that no one is adequate in a case where petitioner must show combination of facts to establish a violation of his constitutional rights.

"If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights, have an *adequate opportunity* to be heard in court.

"This opportunity is not adequate so long as they are required to ride the merry-go-round of *habeas corpus* and writ of error before getting a hearing in federal court. Consequently as far as I am concerned, the Illinois remedies are exhausted here apart from the State's confession of error. I also think that until the State affords a reasonable, clear and adequate means for presenting and disposing of such questions as *Marino's case* involves, this Court should no longer require exhaustion of its present scheme of ineffective and inadequate remedies before permitting resort to the federal district courts sitting in Illinois. We should neither delay nor deny justice nor clog its administration with so useless and harmful a procedural strangling of federal constitutional rights."

We cite with special emphasis the very recent case of *Wade* v. *Mayo*, 334 U.S. 672, which appears to be the basis of the dissenting opinion of Chief Judge Orie L. Phillips, which opinion appears as Pages 48-52 of the Record.

The opinion rendered in this case is a divided opinion. The majority opinion by two circuit judges affirmed the judgment of the U. S. District Court for the Eastern District of Oklahoma, and the dissenting opinion by the Chief Judge, in which opinion he dissents from the majority opinion, and in support of said dissenting cites the following cases: *Wade* v. *Mayo*, 334 U.S. 672, which opinion came down June 14, 1948; and *Powell* v. *Alabama*, 287 U.S. 45, which is oftentimes quoted in cases of like nature, wherein the accused is forced by a state to trial in such a way as to deprive him of effective assistance of counsel in violation of the Fourteenth Amendment; and further that the court below refused to consider Darr's petition on its merits; but for the only reason petitioner had not exhausted his State remedies.

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## CONCLUSION

In conclusion, we aver that we have cited ample authorities to support each and every claim of appellant; that he is entitled to be heard by this Honorable Court, and petitioner respectfully prays that this Court, as the final arbiter of questions arising under the 5th and 14th Amendments to the Constitution of the United States, as well as the Constitution of Oklahoma, will review the judgment of the court below and find and determine that petitioner did not have a fair and legal trial under the 5th and 14th Amendments to the Constitution of the United States and under the Constitution of the State of Oklahoma, and grant him the relief for which he prays.

Respectfully submitted.

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1321 Broadway Pl.,
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*Counsel for Appellant.*

NOVEMBER, 1949.

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1949**

## No. 51

PETE DARR,
*Petitioner,*

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,
*Respondent.*

## BRIEF OF RESPONDENT

MAC Q. WILLIAMSON,
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SAM H. LATTIMORE,
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NOVEMBER, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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## BRIEF OF RESPONDENT

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### STATEMENT

The statement of the case and argument set forth in the brief of petitioner are largely devoted to the alleged facts upon which petitioner based his plea for a writ of *habeas corpus* and an effort to support the merits of such plea. These issues, however, were not decided by the United States District Court (R. 15) or by the United States Circuit Court of Appeals for the Tenth Circuit (R. 45). We assume, therefore, that a discussion of these issues will not

be material except as same may relate to the action of the United States District Court in denying the writ on the ground that petitioner had not exhausted other remedies available to him. Without conceding that there was any merit in the claims of petitioner, we shall confine our discussion to the pertinent portion of petitioner's brief beginning on Page 17.

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## ARGUMENT

In view of the fact that the question of jurisdiction to grant writs of *habeas corpus* and the exercise thereof by United States District Courts in relation to persons incarcerated in state prisons pursuant to judgments of conviction in state courts has been recently before this Court and is one with which the members of the Court are entirely familiar, we feel that an extended discussion of same and of the decisions of this Court, which are discussed in the opinions of the United States District Court and the Court of Appeals of the Tenth Circuit is unnecessary. Certainly the action of these two courts is supported by the decisions of this Court in *Ex parte Hawk*, 321 U.S. 114; *White* v. *Ragen*, 324 U.S. 760, and other cases cited. The one case which caused a division of opinion among the members of the Circuit Court of Appeals is that of *Wade* v. *Mayo*, 334 U.S. 672, 92 L. ed. 1647. We must admit that we have experienced some difficulty in construing the majority opinion. If we correctly interpret it, however, it does not support petitioner's contention. In order that this question may be more easily determined we incorporate in the Appen-

dix hereto the syllabus and body of the opinion of the State Criminal Court of Appeals as reported in *Ex parte Darr*, 182 Pac. (2d) 523. An examination of this opinion discloses the fact that the Criminal Court of Appeals, after reviewing the facts involved in petitioner's application for a writ of *habeas corpus*, found that his contentions were without merit as a basis for relief by *habeas corpus*, and that he should have raised such questions in the proper manner by taking an appeal from his conviction. The petitioner's effort, therefore, to secure release through application to the federal court for a writ of *habeas corpus* does not find support in the decision of *Wade* v. *Mayo*, *supra*, as we understand the same. Certainly, the dissenting opinion is adverse to the contention of petitioner.

## CONCLUSION

We respectfully submit that if petitioner had any basis for a contention that he had been denied any of his rights, he had a proper remedy through an appeal to the Criminal Court of Appeals of the state and by *certiorari* to this Court. At his preliminary hearing and subsequent arraignment in district court, petitioner had been represented by counsel of his own choosing, the same counsel who had represented him in a previous trial resulting in his conviction and a twenty-year sentence in the penitentiary for bank robbery (R. 30). On the day the case was first called for trial petitioner requested appointment of an attorney, and the court thereupon appointed Mr. Cox, who represented him through the subsequent proceedings. Having elected not

to take any appeal or follow other remedies for properly bringing the matter to this Court, petitioner's application to the United States District Court was properly denied, and the action of that court affirmed by the United States Circuit Court of Appeals.

Respectfully submitted,

MAC Q. WILLIAMSON,
*Attorney General of Oklahoma;*

SAM H. LATTIMORE,
*Assistant Attorney General,*
Oklahoma City, Oklahoma,
*Attorneys for Respondent.*

NOVEMBER, 1949.

## APPENDIX

"*Ex parte Darr*, No. A-10869. Criminal Court of Appeals of Oklahoma.

"SYLLABUS:

"1. On *habeas corpus*, this court will not look beyond the judgment and sentence of any court of competent jurisdiction as to mere irregularities of procedure or errors of law on questions of which the court has jurisdiction.

"2. The writ of *habeas corpus* cannot be used to perform the office of writ of error on appeal but will be limited to cases in which the judgment and sentence attacked are clearly void.

"3. Where the court has jurisdiction of the person and jurisdiction of the crime charged and the judgment and sentence are not in excess of the statutory limits of the court's power to pronounce, the same is not void.

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"The petitioner, with the aid of counsel, filed herein on April 3, 1947, his petition for writ of *habeas corpus*, alleging he is unlawfully confined in the state penitentiary, at McAlester, Oklahoma. He complains of two separate judgments rendered against him in the District Court of Lincoln County, Numbered 2197 and 2199, wherein in each case he was sentenced to serve forty years in the penitentiary for robbery with firearms of banks at Prague and Chandler, Oklahoma.

"(1) The petition for writ of *habeas corpus* alleges first that the petitioner did not have the means to employ counsel and second, that he did not have the aid of counsel, and third, that he did not have the aid of counsel of his own choosing. The record, as revealed by certified copies of the criminal appearance dockets in both cases, does not support the contention of the petitioner. These dockets disclose that after being charged by information and on December 1, 1930, the petitioner was present in person and represented in the

district court by Jimmie Mathis and waived the reading of the information and entered a plea of not guilty. That on December 27, 1930, the cases were set for trial January 13, 1931.

"That, on January 13, 1931, it appeared, an application for continuance was filed, stating that defendant was without counsel. Thereupon, the court appointed M. A. Cox, a reputable and able lawyer of Chandler, Oklahoma, to represent the defendant. The record discloses that M. A. Cox ably represented the petitioner throughout the trial, attacking the sufficiency of the information, the sufficiency of the State's evidence, requesting a directed verdict, and after verdict of the jury seasonably filed a motion for new trial and presented same which was overruled and giving notice of intention to appeal and procuring 60-10-5 days time in which to make and serve, sign and settle case-made as a proper predicate for appeal. The record discloses that from this proceeding, no appeal was perfected by the petitioner.

"In cause No. 2197, the record is the same until both the State and the defense rested in the trial, whereupon, the defendant, by aid of counsel, asked leave to withdraw his plea of not guilty and enter a plea of guilty, all of which was granted and done.

"In both cases, January 16, 1931 was set for sentence day and in both cases the defendant was sentenced to forty (40) years in the penitentiary. The court under the law, § 801, Title 21, O.S.A. might have imposed the death sentence in either case.

"It is therefore apparent from the record itself that the defendant was ably represented by counsel and his rights preserved in every stage of the proceedings.

"In cause No. 2199, he complains that he filed his motion for continuance because of insufficient time to prepare and procure witnesses. In this, he was represented by counsel M. A. Cox preliminary to the trial. The court found the defendant has not exercised due diligence in this regard.

"(2-4) It is apparent from the record that the petitioner was ably represented by counsel at every stage of the proceedings and that his contentions are without merit as a basis for relief by *habeas corpus*. The court had jurisdiction of the person of the petitioner and jurisdiction of the crime charged. The judgment and sentences not being in excess of the statutory limits of the court's power to pronounce, the same are not void. This court has repeatedly held that on *habeas corpus* it will not look beyond the judgment and sentence of any court of competent jurisdiction as to mere irregularities of procedure or errors of law on questions over which the court has jurisdiction. The writ of *habeas corpus* cannot be used to perform the office of a writ of error on appeal, but will be limited to cases in which the judgment and sentence of the court attacked is clearly void. *In re: Habeas corpus Henry E. Walker*, Okla. Cr. App., 180 Pac. (2d) 670 (not yet reported in State Report); *Ex parte Tollison*, 73 Okla. Cr. 38, 117 Pac. (2d) 549; *Ex parte West*, 62 Okla. Cr. 260, 71 Pac. (2d) 129; *Ex parte Keel*, 62 Okla. Cr. 277, 71 Pac. (2d) 313; *Ex parte Dunn*, 33 Okla. Cr. 190, 242 Pac. 574; *Ex parte Grant*, 32 Okla. Cr. 217, 240 Pac. 759; *Ex parte Hollingshead*, 24 Okla. Cr. 131, 216 Pac. 496.

"(5) The petitioner's record was preserved. If any of his rights were denied in the proceedings or if the evidence was insufficient in his opinion to support the convictions, he should have raised these objections in this court in the proper manner by appeal.

"For the reasons hereinabove stated, the writ of *habeas corpus* is denied."